H.R. 2731, THE OCCUPATIONAL SAFETY AND HEALTH SMALL EMPLOYER ACCESS TO JUSTICE ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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C O N T E N T S

H.R. 2731, THE OCCUPATIONAL SAFETY AND HEALTH SMALL EMPLOYER ACCESS TO JUSTICE ACT OF 2003

Wednesday, September 17, 2003
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The Subcommittee met, pursuant to call, at 2 p.m., in room 2175, Rayburn House Office Building, Hon. Charlie Norwood [Chairman of the Subcommittee] presiding.

Present: Representatives Norwood, Biggert, Kline, Owens, and Majette.

Staff Present: Stephen Settle, Professional Staff Member; Loren Sweatt, Professional Staff Member; Chris Jacobs, Staff Assistant; Kevin Smith, Senior Communications Counselor; Kevin Frank, Professional Staff Member; and Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Maria Cuprill, Minority Legislative Associate/Labor; and Margo Hennigan, Minority Legislative Assistant/Labor.

Chairman NORWOOD. A quorum being present, the Subcommittee on Workforce Protections of the Committee on Education and the Workforce will now come to order. We are holding this hearing today to hear testimony on H.R. 2731, "The Occupational Safety and Health Small Employer Access to Justice Act of 2003."

Under the Committee rule 12(b) opening statements are limited to the Chairman and the Ranking Minority Member of the Subcommittee. Therefore, if other Members have statements they will be included in the hearing record.

With that, I ask a unanimous consent for the hearing record to remain open 14 days to allow Member's statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Without objection, so ordered.

OPENING STATEMENT OF HON. CHARLIE NORWOOD, CHAIRMAN, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Chairman NORWOOD. Good afternoon and welcome, and my apologies for being a minute late. We are assembled today to conduct a legislative hearing on H.R. 2731, the Occupational Safety

and Health Small Employer Access to Justice Act of 2003. H.R. 2731 proposes that very small employers be able to recover attorney's fees and costs in appropriate circumstances when they prevail in litigation instituted by OSHA.

This is in fact the second hearing on this very important matter. This past June the Subcommittee held a hearing to take testimony on the single provision contained in H.R. 1583. As background I decided to introduce H.R. 2731 as a freestanding bill because I thought we needed to learn more about the impact of awarding attorney's fees and costs to small business owners in workplace safety and health litigation. I did not want the importance of this issue to be lost among other issues or receive less focus than is appropriate.

Now, this need for additional information grew in large part from some very disturbing testimony we received from small employers during the June 2003 hearing. Specifically, we heard two small business owners and an expert in the field of workplace safety and health law passionately argue that they believed OSHA was using the threat of litigation as a way to gain financial leverage over them and other small employers like them. What we were told painted a picture of small employers receiving OSHA citations, and with the firm belief that they had not violated any standard or duty to their employees, they desperately made efforts to defend themselves and save their representations. In one case, we were told that the employer promptly contacted a lawyer following the receipt of his citation and asked about the cost of obtaining help in defending himself against OSHA lawyers. This employer learned something that should not surprise any of us, that competent lawyers don't come cheaply, and that even in the simplest of cases that these fees could easily climb to unaffordable levels for many small business operations in America.

In contrast, we learned that the word is on the street that more often than not OSHA is often willing to settle the cases far under the proposed penalty levels. They are willing to do this to avoid the burden of litigation. Economically, we were told this translates to a very simple equation. Often all an employer has to do is admit that they have violated the law and pay a small fine regardless of whether they in their hearts and minds believe that they are innocent. If they are willing to abandon their principles they can get off with a fine substantially less than the cost of litigation.

This is certainly not what I think Congress intended when it crafted the Occupational Safety and Health Act. This is a Hobson's choice that insults our concept of fairness in government instituted litigation. There is a gain for lawyers, not small business owners who are trying to keep their heads above water in a competitive marketplace so that they can pay their employees salaries. Think about it. Is this the type of intimidating tactics we want associated with OSHA at a time when Congress has directed them to partner with small businesses and to help them reduce their rate of injury and illness through compliance assisted efforts?

As I said, however, I am speaking today on the basis of what we have heard so far. But this is why I think it is so important that we learn more, so I have set three objectives for this hearing.

First, I want to develop a better understanding of why small employers believe so passionately that OSHA is using litigation for financial leverage to force them to admit fault even when there is none present. The burden of proof is on the Secretary to prove a violation of the Act and I understand that no one in OSHA wants to be proven wrong and unjustified in their actions. But sweeping mistakes under the rug through the use of financial leveraging is wrong and should not be tolerated.

Second, in terms of litigation directed at small employers, we need to know whether the threat of having to pay attorneys fees would be enough to force OSHA to pay more fairly and bring this into a better balance. Understand the last thing in the world we want is to create an incentive for OSHA to avoid instituting meritorious cases. But will the possibility of having to pay attorney's fees and costs force OSHA to be just a bit more selective in their pursuit of nonmeritorious or marginal cases?

Last, if we determine that the award of attorney's fees to us provides some incentive for a more fair administration of justice, where should we draw the line on whom should we be able to recover? Is 1.5 million in net worth an effective threshold? How does this figure work in various industry sectors? And what would be the most cost effective threshold to bring this into balance and achieve a desired fairness?

I hope we can answer some of these questions from the side of the victims of this practice today because the next step is to get answers from OSHA lawyers about these practices.

In closing, I leave everyone with this thought. It seems to me that if OSHA is not pursuing frivolous litigation in cases on the margin on merit, if they are not using these financial leveraging techniques then this legislation will have no impact on OSHA at all. It shouldn't cost OSHA one red cent if all these cases are legally sound.

[The prepared statement of Chairman Norwood follows:]

Statement of Hon. Charlie Norwood, Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce

Good afternoon and welcome.

We are assembled today to conduct a legislative hearing on H.R. 2731, the "Occupational Safety and Health Small Employer Access to Justice Act of 2003.

H.R. 2731 proposes that very small employers be able to recover attorney's fees and costs, in appropriate circumstances, when they prevail in litigation instituted by OSHA.

This is, in fact, a second hearing on this very important measure. This past June, this Subcommittee met to take testimony on H.R. 1583, the "Occupational Safety and Health Fairness Act of 2003." The current content of HR 2731 was then a single provision contained in HR 1583.

As background, I decided to introduce H.R. 2731 as a free-standing bill because I thought we needed to learn more about the impact of awarding attorney's fees and costs to small business owners in workplace safety and health litigation. I did not want the importance of this issue to be lost among other issues, or receive less focus than is appropriate.

Now, this need for additional information grew, in large part, from some very disturbing testimony we received from small employers during the June 2003 hearing. Specifically, we heard two small business owners and an expert in the field of workplace safety and health law, passionately argue that they believed OSHA was using the threat of litigation as a way to gain financial leverage over them and other small employers like them.

What we were told painted a picture of small employers receiving OSHA citations and, with a firm belief that they had not violated any standard or duty to their em-

ployees, they desperately made efforts to defend themselves and save their reputations.

In one case, we were told that the employer promptly contacted a lawyer following the receipt of his citation, and asked about the cost of obtaining help in defending himself against OSHA's lawyers. This employer learned something that should not surprise any of us—that competent lawyers don't come cheaply, and that even in the simplest of cases, that these fees could easily climb to unaffordable levels for many small business operations.

In contrast, we learned that the word is on the street that more often than not, OSHA is often willing to settle the cases far under the proposed penalty levels. They are willing to do this to avoid the burden of litigation.

Economically, we were told, this translates to a very simple equation. Often, all an employer has to do is admit that they have violated the law, and pay a small fine, regardless of whether they, in their hearts and minds, believe they are innocent. If they are willing to abandon their principles, they can get off with a fine substantially less than the cost of litigation.

This is certainly not what I think Congress intended when it crafted the Occupational Safety and Health Act. This is a "Hobson's choice" that insults our concept of fairness in government instituted litigation—it is a game for lawyers, not small business owners who are trying to keep their heads above water in a competitive marketplace so they can pay their employee's salaries.

Think about it—is this the type of intimidating tactics we want associated with OSHA at a time when Congress has directed them to partner with small business and help them reduce their rates of injury and illness through compliance assistance efforts?

As I said, however, I am speaking today on the basis of what we have heard so far. But, this is why I think it is so important that we learn more.

So, I have set three objectives for this hearing: First, I want to develop a better understanding of why small employers believe so passionately that OSHA is using litigation for financial leverage to force them to admit fault, even when there is none present. The burden of proof is on the Secretary to prove a violation of the Act—and, I understand that no one at OSHA wants to be proven wrong and unjustified in their actions. But, sweeping mistakes under the rug through the use of financial leveraging is wrong and cannot be tolerated.

Second, in terms of litigation directed at smaller employers, we need to know whether the threat of having to pay attorney's fees would be enough to force OSHA to play more fairly and bring this into better balance. Understand, the last thing in the world we want is to create an incentive for OSHA to avoid instituting meritorious cases. But, will the possibility of having to pay attorney's fees and costs force OSHA to be just a bit more selective in their pursuit of non-meritorious and marginal cases?

Lastly, if we determine that the award of attorney's fees does provide some incentive for a more fair administration of justice, where should we draw the line on whom should be able to recover. Is $1.5 million in net worth an effective threshold? How does this figure work in various industry sectors? And, what would be the most cost effective threshold to bring this into balance and achieve a desired fairness.

I hope we can answer some of these questions from the side of the victims of this practice today, because the next step is to get answers from OSHA's lawyers about these practices.

In closing, I leave everyone with this thought—it seems to me that if OSHA is not pursuing frivolous litigation and cases on the margin of merit—if they are not using these financial leveraging techniques—then this legislation will have no impact at all on OSHA. It shouldn't cost OSHA one red cent if all these cases are legally sound.

Chairman NORWOOD. I would now turn to my friend from New York, Mr. Owens, for any comments he may care to make in his opening statement. Mr. Owens.

OPENING STATEMENT OF HON. MAJOR R. OWENS, RANKING MEMBER, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. OWENS. Thank you, Mr. Chairman. I too want to welcome the witnesses for the afternoon and tell them that I hope that our voting patterns don't inconvenience you too much this afternoon.

Second, I want to commend my Republican colleagues for finally getting around to holding a hearing on this issue. Normally hearings are held first before legislation is considered. That has not been the case with this issue.

In the 105th Congress, this Subcommittee held hearings on and considered legislation to require the National Labor Relations Board to pay the attorney's fees and costs of small employers and unions in cases in which the Board did not prevail. That ill conceived legislation barely passed the House 202 to 200 and would have been defeated was it not for the fact that a number of Democratic Members had accompanied President Clinton on a trip to Africa. The bill died in the Senate without even a hearing.

In the subsequent Congress, H.R. 1987 was introduced but differed from its predecessor in part because it now required OSHA as well as the Labor Board to pay attorney's fees and costs to certain employers in any case in which the agency did not prevail. H.R. 1987 was reported by the Subcommittee on a party line vote but it was never taken to the floor. No hearings were ever held on H.R. 1987. In fact the Republicans sought to impose a new standard on OSHA that would have made it significantly more difficult for the agency to protect workers without ever creating any type of record to justify that change.

I therefore want to commend Chairman Norwood for finally getting around to holding a hearing on this issue, though I note that the first hearing on this should have been held 4 years ago. We are 4 years and 15 minutes late today, but at least democracy is now moving forward.

The issue before us is whether OSHA, apart from all other Federal agencies, should be required to pay attorney's fees even in cases where the agencies is substantially justified in bringing the charge. And as in all cases they would not bring a charge if it was not justified. Generally Federal agencies may be required to pay opposing parties' attorney's fees if the agency's position is not substantially justified. Under H.R. 2731, OSHA would be required to pay certain employers' attorney's fees in any case or proceeding in which it did not prevail regardless of the reason why the agency did not prevail and even if OSHA is substantially justified in bringing the complaint.

As I have said, this is the not the first time we have had to consider this issue. In my view the likely consequence of H.R. 2731 is that OSHA would be less likely to issue complaints against those employers. More safety and health violations will go uncorrected and more workers may be injured or killed as a consequence. There is no private right of action under the OSHA Act. If OSHA prevails to enforce the law, workers have no other means of doing so. In effect H.R. 2731 appears to place a higher priority on compensating employers for the legal fees than on protecting the safety and health of workers.

I am interested in what today's witnesses will have to say on this matter, but I have very serious reservations regarding this legislation.

Thank you very much, Mr. Chairman. I yield back the time and we must go to vote.

Chairman NORWOOD. I thank the witnesses for your patience. If you will excuse us, we will recess for three votes. I apologize to you. It is just the life we lead up here and we will be back just as fast as we can. I am sure we will be the first ones back. We will stand in recess.

[recess.]

Chairman NORWOOD. We have a very distinguished panel of witnesses before us today and a very patient panel of witnesses, and we thank you all very much and apologize to you for the disruptions. If I may, I would like to introduce you to the Subcommittee.

Our first witness is Mr. Lynn Robson, owner of Robson's Greenhouse, which is located on a 10-acre farm in Belleville, Michigan. The greenhouse was founded in 1929 by his father Robert and the third generation of Robsons is presently learning the family trade. The Robson family does most of the work themselves, building expansions to their greenhouses over the off season and relying on several seasonal workers during the early spring. Mr. Robson is testifying on behalf of the American Farm Bureau.

We welcome our second witness, Mr. James Knott, Sr., President and Chairman of the Board, Riverdale Mills Corporation, which is located in Northbridge, Massachusetts. Mr. Knott's company produces wire mesh for lobster traps and prisons and Mr. Knott has been in the lobster industry for over 6 decades. Mr. Knott is testifying on behalf of the National Association of Manufacturers (NAM). We welcome you, sir.

Mr. Scott Nelson is an attorney and Acting Director with Public Citizen Litigation Group in Washington, D.C. He has also served in private practice with the firm of Miller, Cassidy, Larocca and Lewin. Mr. Nelson holds undergraduate degrees and law degrees from Harvard University.

Our final witness is Ms. Anita Drummond, Director of Legal and Regulatory Affairs for the Associated Builders and Contractors in Arlington, Virginia. She has previously worked in private practice and as an advocate and assistant chief counsel for the Small Business Administration.

Before the witnesses begin their testimony I would like to remind all the Members that we will be asking questions after the entire panel has testified. In addition, Committee rule 2 imposes a 5-minute limit on all questions.

Before you ladies and gentlemen is a timer. If you will pay some attention to that, red, caution and green. I pay some attention to it too, but I know you have gone to great trouble and expense and distance to be here so I try to give you as much leeway as I can once it turns red, but be aware there is a limit. With that, Mr. Robson we would like to start with you, sir, and we would love to hear your testimony.

STATEMENT OF LYNN ROBSON, ROBSON'S GREENHOUSE, BELLEVILLE, MICHIGAN, ON BEHALF OF THE AMERICAN FARM BUREAU

Mr. ROBSON. Good afternoon, Chairman Norwood. My name is Lynn Robson. On behalf of the Michigan Farm Bureau I would like to thank you for the opportunity to testify in support of H.R. 2731. I own and manage my own 10-acre nursery in Belleville, Michigan.

My father founded the business in 1929. My sons who are planning to take over 1 day are now learning the family trade. We grow bedding plants and potted plants for markets and direct sale. We are known for our petunias.

For much of the year the family does all the work themselves. During the early spring we employ no more than six or seven seasonal workers to help water and market the plants. Last August my family decided to build an addition to the greenhouse. As with most family farms, we are building in the off season. That is when the trouble started. Tim, a good friend of mine who had come by to visit, was lending me a hand in building the greenhouse. An inspector from Michigan Department of Consumer Services—that is our OSHA—drove up. The inspector informed us that we had violated a construction lift standard. You see, while we were visiting Tim had climbed on a pallet secured to a tractor and was helping me bolt together the frame of the greenhouse.

By the way, in agriculture it is customary when a visitor drops by the farm to lend a helping hand. Neither Tim nor I were doing anything dangerous. It is common practice among family farmers. It is the way that we have always done things. That is why I was surprised with the inspector's reaction. I tried to explain that I am not a contractor, I am just a small farmer. I also explained that he was not and has not been and will not be my employee. He was just visiting and doing what all of us do in the industry, which is help each other.

A few weeks later I received a ticket in the mail violating something called general duty clause, which I still haven't a clue of what that means. I thought I was being cited for a man lift violation. I didn't even have any employees at the time. In August it is in the off season.

A few points. First, I thought I was supposed to follow the agriculture standards. That is what I have always been following. I would like to think that I am doing a good job. I have never been cited before or had to pay any Workman's Comp claim. Most of my employees have been with me more than 10 or 15 years so I figure I must be doing something right.

Second, I am still not clear on the legal charges against me or what I am supposed to do. I run a very small, safe operation. Everybody knows that. I guess the inspectors eventually figured that out because they cut my fine in half. They also told me that they want to meet with me and talk about a settlement. But they keep rescheduling the meeting. It has been more than a year now.

Third, I have talked about getting a lawyer. It would cost less to pay the fine and be done with it, but I don't think I have done anything wrong. It cuts against the grain to pay a fine when I feel I am innocent. I have also asked whether I should recover any legal fees. Why shouldn't OSHA have to pay it if I am proven innocent? Everybody tells me that it is a possibility, but it might just complicate matters.

Last and more importantly, I care when OSHA claims that I have created a hazard. In a small community people care about what friends and family and employees and the general community think about your business. I would never put anybody in harm's way, especially my family. They do most of the work. I believe in

safety and health. I believe in doing what is right, but I also believe OSHA should do what is right. Any time a small farmer like me receives a citation there are very serious consequences.

I wish I could describe how disruptive this whole process has been. I am here today because there are very few consequences. OSHA inspectors make mistakes. It is far too easy for the government to keep the pressure up if I admit I am wrong regardless of whether I believe it in my heart. So I am going to fight as long as I can. It is the principle of the matter. I don't think the government should be allowed to change the rules in the middle of the game. If they want to impose construction standards on farmers, then fine. But don't come at me through the back door. Come at me straight.

More importantly, many small farmers are facing similar situations today. It is happening to me and it is happening to them. The problem is most of them are not going to fight when they should. It is simply easier to pay the ticket. I am here today because I don't think that is right. I don't think it is right to deny small farmers their day in court just because it is easier. That is why small farmers across America will support H.R. 2731. It will help level the playing field against the cause of OSHA to think about the consequences of their actions.

I would also urge the Subcommittee to raise the net worth threshold. In my industry farmers are asset rich but cash poor. I am a very small farmer and barely qualify. I have spoken with other small farmers and they don't feel they might qualify. Mr. Chairman, if there is any way to raise the threshold I think many farmers would benefit.

Thank you, Mr. Chairman, for your leadership in introducing this bill. I would encourage the Subcommittee to follow your leadership and pass it swiftly. Thank you for your time.

[The prepared statement of Mr. Robson follows:]

Statement of Lynn Robson, Belleville Greenhouse, Belleville, Michigan, on behalf of the American Farm Bureau

My name is Lynn Robson. On behalf of the American Farm Bureau Federation, I would like to thank you for this opportunity to testify in support of H.R. 2731, the OSHA Small Employer Access to Justice Act.

I own and manage a small, 10-acre nursery in Belleville, Michigan. My father founded the business in 1929. My sons, Nicholas and Kevin, are planning to take over one day and are now learning the family trade. We grow bedding and potted plants for local markets and direct sales. We are known for—and are especially proud of—our petunias.

For much of the year, my family does all the work themselves. During early spring, no more than six or seven seasonal workers are employed to help water and market the plants.

Last August, my family decided to build an addition to a greenhouse. As with most family farms, we were building the addition in the off-season.

That's when the trouble started. Tim, a good friend of mine, who had come by to visit, was lending me a hand when an inspector from Michigan's Department of Consumer and Industry Services—that's our OSHA—drove up.

The inspector informed us that I had violated a construction lift standard. You see, while he was visiting, Tim had climbed onto a pallet secured to a tractor, and was helping me bolt together the frame of the greenhouse.

As an aside, in agriculture, it is customary when a visitor drops by for them to lend a hand. Neither Tim nor I thought we were doing anything dangerous. It's a common practice that most family farmers undertake. It's the way we have always done things.

That is why I was so surprised when the inspector informed me of a violation. I tried to explain that I was not a contractor, subcontractor or any other "-or" related to the construction industry. I'm just a small farmer. I also explained that Tim was not, has not been, and will not be, my employee. He was just visiting and doing what all of us in this industry do—help each other.

A few weeks later I received a ticket in the mail for violating something called the "general duty" clause. And it's a serious violation of the general duty clause. I'm still not sure what that means. I thought I was being cited for violating a construction standard. I didn't even have employees at the time. August is the off-season.

A few points: First, I thought that I was supposed to follow the agriculture standards. That is what I've been following, and I would like to think I'm doing a good job. I routinely have safety inspections by my family, insurance companies, and consultants. I have never been cited before, had an injury, or had to pay a worker's compensation claim. The average length of employment of my employees is more than 15 years, so I figure I must be doing something right.

Secondly, I am still unclear about the legal charges against me, and what I am or was supposed to do. I run a very small, very safe operation. Everyone knows that. I guess the inspectors eventually figured that out, because they have since cut the fine in half. They have also told me they want to meet to talk about settlement, but they keep rescheduling the meeting. It's been more than a year now.

Thirdly, I have talked about getting a lawyer. I learned it would cost far less to just pay the fine and be done with it. But I don't think I've done anything wrong and it cuts against the grain to pay a fine when I feel I am innocent. I have also asked whether I should try to recover my legal fees. Why shouldn't OSHA have to pay if I'm proven innocent? The answer: It's possible but I may just complicate matters.

Lastly, and more importantly, I care very, very much when OSHA claims that I have created a hazard. It's a charge that most of America's small farmers would want to fight. In a small community, people care about what friends, family, employees and the general community think about a business owner. I would never subject anyone to hazards, especially my family. They do most of the work we are talking about. I believe in safety and health. I believe in doing what is right but I also believe in OSHA doing what is right.

Any time a small farmer like me, or any other small employer receives a citation, there are very serious consequences. I wish I could describe just how disruptive this whole process has been. I am here today because I now believe there are few consequences for OSHA inspectors when they make mistakes. It is far too easy for the government to keep up the pressure until I agree to admit doing something wrong, regardless of whether I believe in my heart I did.

So I am going to fight as long as I can. It's the principle of the matter. I don't think the government should be allowed to change the rules in the middle of the game. If they want to impose construction standards on farmers, then fine, but don't come at me through the back door. Come at me straight.

More importantly, many small farmers are facing similar situations today. I am like every small farmer in America. If this is happening to me, it's happening to them. The problem is that most of them are not going to fight when they should. It is simply more expedient to pay the ticket. Just an hour consultation with a lawyer can cost more.

I am here today because I don't think that's right. I don't think it's right to deny small farmers their day in court, just because of expedience. That is why small farmers across America will support H.R. 2731. It will help level the playing a field a bit and cause OSHA personnel to think about the consequences of their actions.

Thank you, Mr. Chairman, for your leadership in introducing this bill. I would encourage the committee to follow your leadership and pass it swiftly.

Additionally, I would urge the committee to raise the net-worth threshold. In my industry, we have a saying: farmers are asset rich but cash poor. I'm a very small farmer, and have spoken with others. Mr. Chairman, I think many family farmers would benefit from such an increase.

Thank you all for your time.

Chairman NORWOOD. Thank you, Mr. Robson. I can't wait to get to questions with you. I was in the nursery business too. I have been in that bucket a lot of times on that tractor. I understand.

Mr. Knott, it is now your turn to testify, sir.

STATEMENT OF JAMES KNOTT, RIVERDALE MILLS, NORTHBRIDGE, MASSACHUSETTS, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. KNOTT. Good afternoon, Mr. Chairman and Members. I am very pleased to appear before this Subcommittee on behalf of the National Association of Manufacturers, commonly called NAM. The NAM is the nation's largest and oldest multi-industry trade association. NAM represents 14,000 members, including 10,000 small and mid-sized companies and 350 member associations serving manufacturers and employees in every industrial sector of all 50 States.

My name is James M. Knott, Sr., and I have been in business since 1942, when as a 12-year-old I put my first lobster traps into the Atlantic Ocean. Along the way I came up with a plastic coated wire mesh lobster trap far superior to the traditional wooden traps, and this same mesh also rings many American prisons and protected Kuwait's border with Iraq, and the U.S. Government took it down recently because it is no longer needed. But there will be some other business I am sure.

Through all my hard work and success I remained loyal to the business routes in the lobster business as I still fish for lobsters as a Commonwealth of Massachusetts licensed commercial fishermen. In addition to serving as the Director of NAM, I have been appointed as a volunteer Small Business Administration Regulatory Fairness Board member with the SBA Office of the Ombudsman. I am dedicated to making sure that America's small businessmen and women are treated fairly in the regulatory enforcement process.

My first encounter with OSHA occurred when a young OSHA inspector tried to conduct an inspection but only succeeded in demonstrating his ignorance of OSHA regulations. His final report contained about 15 noncompliances, all of which were eventually proved untrue. This didn't occur until I filed an appeal, went to the OSHA offices in Boston, met with an OSHA lawyer and presented my arguments. The inspector simply didn't know or understand what he was supposed to do. Eventually his ignorance wasted a whole lot of time and money for me and for all of us who pay his salary.

An interesting sidelight to this first encounter was my plant engineer's story about the inspector. While the inspection was going on he said I know that guy. He used to work at a bakery where I was a plant engineer before they went out of business. He was on the production line bagging buns.

Our company has received numerous safety awards, including the statewide group winner of the Massachusetts Safety Council, and from the National Safety Council's Central Mass chapter. We have received those three times in three different years.

I have also participated in a voluntary inspection program with the Commonwealth of Massachusetts Department of Labor that would eliminate the need for us to have an OSHA inspection for 1 year. This evidence was presented to an OSHA inspector as he arrived at our facility during that 1 year timeframe. The leader of the group said they don't know what they are doing. We are going to do a wall to wall inspection today. I knew I could tell the inspec-

tors to leave the premises and get a warrant if they wanted to, but I decided to cooperate and let them do a wall to wall inspection. During the inspection, much of which I attended, they made a number of outlandish comments and clearly demonstrated their lack of knowledge. The most interesting of all involved a hole in Riverdale Street, a street that I own that is on top of the Riverdale Dam, a dam that created the Riverdale Mill Pond in 1753 from the waters of the Blackstone River, waters I use to generate electricity with a 1901 hydro power turbine I restored in 1984. The hole was created by a flood that had washed some fill out from under the street. The hole was less than 6 feet deep, and we filled it with 13 cubic yards of self leveling concrete later in the day. That is about the size of a full sized station wagon. When the OSHA inspector arrived on the scene he saw that one of my plant maintenance men with whom I have worked with more than 40 years had lowered a ladder into the hole, had climbed down it a rung above the bottom to measure the hole so he would be able to determine how much self leveling concrete to order. One wall of the hole was a poured concrete sluice way that conveyed water under the street and into the hydro power pit. The other wall was a hole and the other wall was the dirt at its natural angle of repose. As my maintenance man was climbing back the OSHA inspector said get out of that trench, you are violating our trench regulation. My mature and experienced maintenance man attempted to explain to the inspector what he was doing, that the hole was not a trench. OSHA inspector told my man he didn't want to hear any excuses.

A few weeks later I received an OSHA document that said among many other things I had endangered a man's life by violating the OSHA trenching regulation. I have read the OSHA manuals from cover to cover on several occasions, and I found that the inspector was as ignorant as I had suspected. He didn't know the OSHA definition of what a trench is. An OSHA regulated trench is five or more feet deep. The hole was less than five feet deep and trenches certainly don't have one poured concrete wall and the other dirt at its natural angle of repose.

The total fine as a result of the inspection was $4,500. I called OSHA and they said appealing this thing is going to cost you a lot of time and money. I can cut the fine in half if you would like to settle the matter. I said the fine isn't the problem. The problem is that OSHA has created a public document that says I endangered a man's life. The inspector does not know the regulations. The next communication was from a U.S. attorney in the Boston office. He went on to say I know OSHA offered to cut the fine in half. I can cut it in half again if you want to settle the matter. I said I want to get that inspector up on a witness stand and have my lawyer demonstrate to the judge that he doesn't know the OSHA regulations. The attorney said I will see you in court.

I called my lawyer, who knows much more about the protocol of the legal system than I do and I told him to begin a discovery process. A few days after the motion was filed, my attorney received a notice from the court and it said the joint motion to dismiss has been granted. When he called me with the news, I was furious and told him I wanted to get that inspector on the witness stand to expose him. My lawyer, with whom I have worked more than 40

years, said so would I, but there is nothing we can do because the judge has dismissed the case.

More seriously was a time when an OSHA inspector was accompanied by two armed Federal marshals. I had previously refused this same inspector entry to my factory without a warrant because I had just passed an OSHA inspection mere months before. The inspector was simply there to harass me because I hadn't bent to OSHA's will. He put together a series of nonsensical complaints for which the fine was $8,400. I went through my now standard operating procedure, but this time there was no cut the fine in half shakedown offers if I just wouldn't contest OSHA's preposterous ruling, I turned the case over to my attorney and waited for my day in court. Five days later, before the day in court, my lawyer called me on his conference room phone and introduced me to the attorney who was going to prosecute the case. The attorney said, Mr. Knott, I have read your appeal and I am willing to eliminate three of the seven complaints but we have got you on four and I would like to know if you are willing to pay the fine so we don't have to go to court. I said I want to go to court. But let me tell you what I am going to tell the judge about each of the ridiculous and fallacious complaints. He said, OK, let's start with the working platform that doesn't have a guardrail. I said the platform is not a working platform. It is a storage rack. And there is no way it could be used with a guardrail. If I had a guardrail someone would have to go up on the rack, remove the guardrail every time something was put on a rack and that would be a greater hazard than there is now. The Assistant U.S. Attorney said we will eliminate that. Let's go on to the next. The remaining three were as ridiculous and fallacious as the guardrail. I presented my arguments.

Chairman NORWOOD. Mr. Knott, you are considerably over the 5 minutes. I am thoroughly enjoying your testimony. Would you like it wrap up?

Mr. KNOTT. Let's see. My problem with H.R. 2731 is the same as the one beside me, that the numbers are too small. I think the SBA definition of a small business should be 500 employees and I think the net worth is too small. We are an asset rich country, which is one of the reasons why I am able to compete with China because we have high speed equipment that permits us to compete.

Chairman NORWOOD. Sir, do we all do have your written testimony?

Mr. KNOTT. Yes, thank you.

Chairman NORWOOD. And everyone here will look at it.

[The prepared statement of Mr. Knott follows:]

Statement of James Knott, Riverdale Mills, Northbridge, Massachusetts, on behalf of the National Association of Manufacturers

Good afternoon, Mr. Chairman and members.

I am pleased to appear before this subcommittee on behalf of the National Association of Manufacturers (NAM). The NAM is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members, including 10,000 small and mid-sized companies and 350 member associations serving manufacturers and employees in every industrial sector and all fifty states.

My name is James M. Knott, Sr. I have been in business since 1942 when, as a 12-year old, I put my first lobster traps into the Atlantic Ocean. Along the way I came up with a plastic-coated, wire mesh lobster trap far superior to traditional wooden traps. This same mesh also rings many American prisons and protects Ku-

wait's border with Iraq. Through all my hard work and success, I have remained loyal to my business roots in the lobster business as I still fish for lobsters as a Commonwealth of Massachusetts Licensed Commercial Lobsterman.

Unfortunately all my business experiences haven't been as pleasant. My first encounter with OSHA occurred when a young OSHA inspector imperiously tried to conduct an inspection but only succeeded in demonstrating his ignorance of OSHA regulations. His final report contained about fifteen non-compliances—all of which were eventually proved untrue. This didn't occur until I filed an appeal, went to the OSHA offices in Boston, met with an OSHA lawyer and presented my arguments.

The inspector simply didn't know or understand what he was supposed to do. Eventually, his ignorance wasted a whole lot of time and money.

An interesting sidelight to this first encounter was my plant engineer's story about the inspector. While the inspection was going on, he said, "I know that guy. He used to work at a bakery where I was plant engineer before they went out of business. He was on the production line bagging buns."

Our company has received numerous safety awards including the statewide group winner of the Massachusetts Safety Council and from the National Safety Council's Central Mass. Chapter. I have also participated in a voluntary inspection program with the Commonwealth of Massachusetts' Department of Labor and that would eliminate the need for us to have an OSHA inspection for one year.

This evidence was presented to an OSHA inspector as he arrived at our facility during that one year time frame. The leader of the group said, "They don't know what they're doing; we're going to do a wall-to-wall inspection today."

I knew I could tell the inspectors to leave the premises, and get a warrant, if they wanted, but I decided to cooperate and let them do a wall-to-wall inspection.

During the inspection, much of which I attended, they made a number of outlandish comments and clearly demonstrated their lack of knowledge.

The most interesting of all involved a hole in Riverdale Street, a street that I own, that is on top of the Riverdale dam, a dam that created the Riverdale millpond in the 1700's, from the waters of the Blackstone River; waters I use to generate electricity with a 1901 hydropower turbine I restored in 1984.

The hole was created by a flood that had washed some fill out from under the street; the hole was less than six feet deep and we filled it with 13 cubic yards of self-leveling concrete, later in the day (thirteen yards is about the volume of a full-sized station wagon).

When the OSHA inspector arrived on the scene he saw that one of my plant maintenance men, with whom I have worked for more than forty years, had lowered a ladder into the hole and had climbed down to a rung above the bottom, to measure the hole, so he would know how much self-leveling concrete to order.

One wall of the hole was a poured concrete sluiceway that conveyed water under the street and into a hydropower-turbine pit; the other wall of the hole was dirt at its natural angle of repose.

As my maintenance man was climbing back up the ladder, the OSHA inspector said, "get out of that trench, you are violating our trenching regulation!"

My mature and experienced maintenance man attempted to explain to the inspector what he was doing, and that the hole was not a trench.

The OSHA inspector told my man that he didn't want to hear any excuses, the hole was a trench.

A few weeks later I received an OSHA document that said, among many other things, that I had endangered a man's life by violating the OSHA trenching regulation.

I have read OSHA manuals from cover to cover, on several occasions and found that the OSHA inspector was as ignorant as I had suspected. He didn't know the OSHA definition of what a trench is: an OSHA-regulated trench is five or more feet deep, the hole was less than five-feet deep and trenches certainly don't have one poured concrete wall and another wall of dirt, at its natural angle of repose.

The total fine, as a result of the inspection, was $4,500.00.

I called OSHA and they said, "Appealing this thing is going to cost you a lot of time and money, I can cut the fine in half if you'd like to settle the matter."

I said, "The fine isn't the problem. The problem is that OSHA has created a public document that says I endangered a man's life; the inspector doesn't know the regulations."

The next communication was from a U.S. attorney in the Boston office of the Justice Department.

He went on to say, "I know OSHA offered to cut the fine in half, but I can cut the fine in half again if you want to settle the matter."

I said, "I want to get that inspector up on the witness stand and have my lawyer demonstrate to the judge that he does not know the regulations."

The attorney said, "I'll see you in court."

I called my lawyer, who knows much more about the protocol of the legal system than I, and told him to begin a discovery proceeding with interrogatories and the production of, notes, photographs, videos and documents related to the case.

A few days after the motion was filed, my attorney received a notice from the court that said, "the joint motion to dismiss the case had been granted."

When he called me with the news, I was furious! I told him I wanted him to get the inspector on the witness stand to expose him.

My lawyer, with whom I have worked for more than forty years said, "so would I, but there's nothing we can do because the judge has dismissed the case."

More seriously was the time an OSHA inspector was accompanied by two armed federal marshals. I had previously refused this same inspector entry to my factory without a warrant because I had just passed an OSHA inspection mere months before. This inspector was simply there to harass me because I hadn't bent to OSHA's will.

He put together a series of nonsensical complaints for which the fine was $8,400.

I went through my now-standard operating procedure, and appealed the case.

This time, there were no "cut-the-fine-in-half" shakedown offers if I just wouldn't contest OSHA's preposterous ruling. I turned the case over to my attorney and waited for my day in court.

Five days before the day in court, my lawyer called me on his conference phone and introduced me to the attorney who was going to prosecute the case.

The attorney said, "Mr. Knott, I've read your appeal and I'm willing to eliminate three of the seven complaints, but we've got you on four and I'd like to know if you're willing to pay the fines so we don't have to go to court."

I said, "I want to go to court, but let me tell you what I'm going to tell the judge about each of the ridiculous and fallacious complaints." He said, "Okay, let's start with the working platform that doesn't have a guardrail."

I said, "The platform is not a working platform, it is a storage rack and there's no way it could be used with a guard-rail."

If it had a guardrail someone would have to go up on the rack and remove the guardrail every time something was put on or taken off. That would create a much greater hazard than there is now.

The Assistant U.S. Attorney (AUSA) said, "We'll eliminate that one, let's go on to the next."

The remaining three were as ridiculous and fallacious as the storage-rack guardrail.

I presented my arguments and the AUSA agreed to eliminate each one. My attorney and the AUSA shut off the conference phone and held a private conference. A few minutes later, my attorney got back on the phone and said, "The attorney is willing to dismiss the case if we will agree not to seek damages for this time-consuming event."

I said, "I'm so busy for the next few weeks that I need to close this case despite the fact that I would like the opportunity to expose these inspectors for what they do." The case was closed by exchanging paperwork.

All of the above is thoroughly documented. I go into much greater detail in my personal written statement.

My experience with OSHA shows how its inspectors can get totally out of control, and H.R. 2731 is a step in the right direction. The one exception I take with the bill is the size requirement for small business being set way too low for those that would be able to get their attorneys' fees back if they prevailed. This section of the bill needs to be changed to reflect a true small business definition. I along with the NAM believe that a better definition would be the SBA definition. The most common size standards are 500 employees for most manufacturing and mining industries.

Please also reconsider these small net worth figures you have set in the bill. In today's modern manufacturing world we are very asset rich in machinery and equipment but this surely does not make us a so-called big business.

Thank you Mr. Chairman and committee members for your time and attention to this matter. I would be happy to answer to any questions you may have for me.

Chairman NORWOOD. Mr. Nelson, you are now recognized for 5 minutes or so.

STATEMENT OF SCOTT NELSON, PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON, D.C.

Mr. NELSON. Good afternoon, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me here today. Since my testimony is set forth in writing I will just summarize the points that are made there in.

I would like to start by explaining one thing that is not explained in my testimony. My organization Public Citizen is a frequent litigant with the Federal Government of the United States and in that capacity we have considerable experience with the Equal Access to Justice Act, which generally governs our entitlement to attorney fees if we prevail, just as under current law it governs the entitlement of an OSHA enforcement action target if that person prevails in litigation before the agency or in court. The Equal Access to Justice Act generally provides—.

Chairman NORWOOD. Pull that mike up. There you go. Turn that baby on.

Mr. NELSON. Thank you, Mr. Chairman. The Equal Access to Justice Act generally provides—by the way I will say people don't usually ask me to talk louder so I appreciate it. The Act generally provides that litigants before Federal agencies or in the courts get fees if the agency's position was not substantially justified. That provision applies in a broad variety of enforcement actions and in actions where citizens are forced to bring suit against the government in order to obtain its compliance with the law. It reflects—and I am not here to present the Federal Government's interest in that substantial justification standard, but it apparently reflects Congress' judgment that for the run of cases the no substantial justification standard is appropriate for determining whether or not a prevailing party should obtain fees. That may be right or wrong, but the issue posed by this legislation is whether a special exception should be created for OSHA enforcement actions. It seems to me that turns on whether there is some need to chill OSHA enforcement beyond what the no substantial justification standard already does, whether there is a problem with OSHA enforcement that justifies the conclusion that OSHA as compared to other Federal agencies should be singled out for a special standard to discourage its enforcement actions.

Now, the law already would provide that if an OSHA action is frivolous, if it lacks a substantial justification, as some of the instances that we have heard discussed today would suggest may happen from time to time, that someone who prevails against OSHA can already get fees. The question is, is OSHA so out of control that a special law is needed to tighten the standard? I think that while no one who litigates with the Federal Government would deny that Federal agencies, including OSHA, sometimes act unreasonably, that the evidence that OSHA singularly deserves to have this special standard is lacking.

OSHA's overall enforcement effort, by the account of the leaders of this Administration, needs to be stepped up, not cut back. Its enforcement effort on the whole is relatively modest. There are a fairly small number of contested cases each year. Very few of them go to hearing. And in even fewer is there a determination that OSHA has failed to carry its burden or has behaved unreasonably. In ad-

dition, OSHA's penalties are relatively modest. The typical violation involves a penalty, a serious violation involves a penalty of about $900 and OSHA's procedures are designed to accommodate small businesses.

In our view, while it can certainly be said that OSHA, like every other Federal agency, sometimes oversteps its bounds, the case for sending a message that OSHA enforcement activities as compared to those of other Federal agencies need to be singled out, to be discouraged through this type of legislation has not been met.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Nelson follows:]

Statement of Scott Nelson, Public Citizen Litigation Group, Washington, DC

Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you this afternoon. The subject of my testimony is H.R. 2731, titled the "Occupational Safety and Health Small Employer Access to Justice Act of 2003." H.R. 2731 would provide that certain small employers who prevailed in OSHA enforcement actions at the administrative level or in the courts would be entitled to receive attorneys' fees even if OSHA could show that its position was "substantially justified," which would otherwise preclude an award of attorneys' fees under the ordinary standards of the Equal Access to Justice Act (EAJA). For the reasons that follow, the creation of a special exception to the EAJA's no-substantial-justification requirement applicable solely to OSHA enforcement actions is not warranted.

The EAJA is the basic attorney fee-shifting statute applicable to litigation and adversary administrative proceedings involving the federal government. In general, it provides that individuals (except the very wealthy), small businesses, certain nonprofit organizations, and charitable organizations can recover attorneys' fees when they prevail in litigation against the federal government and the federal government cannot show that its position was substantially justified.

The no-substantial-justification requirement is applicable in a wide variety of situations in which people of limited means are forced to litigate their rights against our powerful government. The great majority of EAJA cases involve Social Security claimants—obviously not persons of substantial means—who, even when they prevail against the federal government and succeed in obtaining benefits to which they are entitled, must face the additional burden of litigating over whether the government's position was substantially justified before they may obtain attorneys' fees. The same is true of individual litigants in veterans' benefits cases, and a similar rule applies to parties who prevail against the United States in cases involving income taxes.

Similarly, persons or organizations who prevail in litigation establishing that an agency such as OSHA has failed to carry out a statutory mandate (such as the issuance of standards for protection of workers) are also not entitled to an award under the EAJA if the government's position was substantially justified. For example, my organization, Public Citizen, recently prevailed in litigation establishing that OSHA's decade-long delay in taking action to protect workers against the risks posed by hexavalent chromium was unreasonable and violated the Administrative Procedure Act. As difficult as it is to prevail in such litigation, establishing an entitlement to attorneys' fees would have required us to litigate over whether the agency's actions were "substantially justified," a task we decided not to attempt to undertake.

The ability of persons and organizations to obtain fees under EAJA has recently been even further limited by the federal courts' application to EAJA of the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). *Buckhannon* held that a fee award claimant whose litigation was a catalyst in bringing about the result desired (for example, through a settlement) but who did not obtain a court order formally granting relief was not a "prevailing party." The application of *Buckhannon* to EAJA cases has further limited the ability of persons who litigate against the federal government to obtain fees for their efforts, even when those efforts succeed.

H.R. 2731 would single out one class of litigants (small businesses) in one category of cases (OSHA enforcement proceedings) and relieve them of the burden of alleging that the agency's position was "not substantially justified" when they seek

attorneys' fees. These litigants are no more deserving of consideration, no more lacking in resources, no more put upon by the government, and no more at a disadvantage in relation to the government's litigation resources, than the many other litigants in other types of cases who would remain subject to the no-substantial-justification requirement when they sought attorneys' fees. Singling out these litigants for special treatment that is denied to, for example, Social Security disability claimants and disabled veterans, is unfair and unjustified.

Moreover, if new exceptions were to be created, OSHA enforcement proceedings would not be the place to start. There is insufficient reason to believe that these proceedings present a special problem that needs to be addressed, and there is a significant likelihood that this legislation would further weaken OSHA enforcement efforts to the detriment of American workers.

To begin with, there is little reason to think that OSHA overenforces worker safety and health regulations against either small or large businesses. As both Secretary of Labor Chao and OSHA Administrator Henshaw have emphasized in their public statements, American workers continue to suffer occupational injuries and diseases from causes that OSHA's standards are designed to prevent. Even under its current leadership, which can hardly be described as hostile or unsympathetic to the needs of business, OSHA has stressed a need for increased enforcement (especially directed at serious violations and repeat violators), not weaker enforcement efforts.

The numbers also help tell the story. According to the annual appropriations requests of the Occupational Safety and Health Review Commission (OSHRC), over the last several fiscal years OSHA's workplace inspections (which have ranged between about 34,000 and 38,000 annually) have generated about 2,100–2,400 new contested case filings with the OSHRC each year. Of those cases, the great majority settled, and only 95 to 156 actually were disposed of after a hearing by an ALJ. Even fewer, ranging from 15 to 37, were subject to review proceedings before the Commission itself and disposed of on the merits; and only a handful ever reached the courts. [1]

Moreover, these cases for the most part do not involve onerous penalties. In only about 200 cases a year does the agency even seek penalties that would exceed $50,000. [2] OSHA's figures show that even for what it considers "serious" violations, its average penalty in fiscal year 2002 was $977, and in fiscal year 2001, the average was $930. [3] Moreover, the adjudicatory proceedings used in OSHA enforcement actions are calibrated to accommodate the needs of small employers in simple cases: Approximately 1/3 of the new cases filed before OSHRC are assigned to its "E–Z" trial track, which is designed to help minimize expenses. [4] Moreover, OSHA has instituted outreach programs specifically designed to assist small businesses with compliance, and OSHA's standard-setting process is required by statute to ensure that the needs of small businesses receive special consideration when OSHA establishes the rules that businesses must live by.

The picture, overall, is hardly one of an agency that is out of control. The number of OSHA enforcement actions that actually involve contested adjudications is fairly small, the penalties are generally modest, and the substantive and procedural standards are already supposed to accommodate the interests of small-business litigants. The number of cases in which the agency actually brings an unwarranted enforcement action (let alone one that is without "substantial justification") is undoubtedly small. Most cases settle, which is probably desirable, and though that would likely continue to be the case regardless of the passage of this legislation, the legislation might undesirably tip the scales in ways that would make settlements more favorable to employers and less beneficial to the workers OSHA is supposed to protect.

This is not to say that instances of unfairness cannot be found in the annals of OSHA enforcement. The same is true, however, in many other agencies. The question is whether there is a special need for a different rule for OSHA, and the answer, I submit, is no. Moreover, the creation of a special rule in this context could carry with it substantial costs. Enforcement actions against very small businesses will in the majority of cases be aimed at redressing and deterring dangerous conditions by recovering modest financial penalties. If enforcement personnel fear that failure to win even a case that is demonstrably substantially justified may result

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[1] These figures are taken from OSHRC's fiscal year 2004 budget request, which is available at http://www.oshrc.gov/budget/cong20041c.html.

[2] This data also comes from OSHRC's fiscal year 2004 budget request.

[3] This figure is taken from OSHA's website, http://www.osha.gov/pls/oshaweb/owadisp.show—document?p—table=NEWS—RELEASES&p—id=9863.

[4] This figure, again, comes from OSHRC's fiscal year 2004 budget request.

in an award of fees against the agency that would significantly exceed the expected penalty, they will likely be overdeterred from bringing meritorious proceedings against businesses who fall within the scope of the legislation. The result may be a skewed set of enforcement priorities and a risk of injury, illness, or even death to workers. Given that, even according to OSHA, too many workers continue to be subject to workplace injuries and diseases (indeed, OSHA Administrator Henshaw recently stated that 16 workers a day still die in this country from occupational causes[5]), the balance should be struck in favor of protecting workers, not inhibiting enforcement. As OSHA continues to remind us, we need more enforcement of workplace safety standards, not less.

Thank you.

Chairman Norwood. Thank you, Mr. Nelson. And just so you know, I would be happy to have this same provision in the law for every Federal agency. I think it would be very appropriate. But I have jurisdiction over OSHA. So that is why we are talking about OSHA today and not all the other Federal agencies that I wish other Chairmen would do the same thing for.

Ms. Drummond, you are now recognized for 5 minutes or so.

STATEMENT OF ANITA DRUMMOND, DIRECTOR, LEGAL AND REGULATORY AFFAIRS, ASSOCIATED BUILDERS AND CONTRACTORS, ARLINGTON, VIRGINIA

Ms. DRUMMOND. Good afternoon. Chairman Norwood and Members of the Subcommittee, my name is Anita Drummond. I am Director of Legal and Regulatory Affairs for Associated Builders and Contractors. I would like to thank the Subcommittee for holding this hearing today on the Occupational Safety and Health Small Employer Access to Justice Act of 2003. This issue is of significant interest to ABC members not just under the OSHA regulations but all Federal legislation. Our members are frequently faced with the tremendous cost of defending citations, and I will be summarizing my comments in order to appreciate the time of the Subcommittee.

ABC is a national trade association of 23,000 contractors, primarily very small contractors of all various specialties. There is a vast disparity in resources between small business owners and Federal agencies. Because of these inequalities in the litigation environment small businesses and individuals are often forced to choose between settling with the government to avoid litigation costs regardless of the merits of their case. To address this concern, the Equal Access to Justice Act, EAJA, was passed to level the playing field, particularly for small businesses, and to encourage the Federal Government to ensure that the claims that they are pursuing are worthy of this effort.

Under current law an employer may only recover attorney's fees and costs, as Mr. Nelson indicated, under the substantially justified standard. This does not require that the government show a substantial likelihood of success in prevailing. In fact the courts have been very mixed in their determination of what the standard means. The Supreme Court simply says that it is a reasonable basis in law and fact. And you have very mixed court decisions on what exactly that means.

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[5] http://www.osha.gov/pls/oshaweb/owadisp.show—document?p—table=NEWS—RELEASES&p—id=10188

In the OSHA environment there are many technical and complex regulations and they are subjected to tremendous interpretation. And I will discuss specifically the general duty clause which has been referenced by the witnesses. The ambiguities are rampant under the standard. And, in fact, when there are environments where a Federal agency may have mixed interpretations there have been courts to determine it didn't matter if there were mixed interpretations, that the defense that a small business posed was not sufficient to get prevailing wages under EAJA. This wasn't OSHA in this case. It was a Coast Guard case. The Coast Guard had mixed interpretations of its own standard but a small business couldn't rely on those ambiguities to prove that the agency wasn't substantially justified. The standard simply didn't work in any kind of predictable manner, which is exactly what a good legal system does. It has predictability and you can make good decisions.

In the OSHA environment there is a 90 percent settlement rate. Well, the reason there is a 90 percent settlement rate is because of the issues that have been discussed. When the agency continually says, well, we will settle, we will cut your fees; it is easier for small business. It can easily cost $20,000 to litigate a defense on a citation that is for $8,400? The math is pretty simple. However, it has other implications for public policy. And these are the issues that obviously the Subcommittee has to deal with for public policy discussion. If a small business is cited and settles, that citation does go on the public record. And the way that plays out, and I will use the example of a public procurement system. A public procurement system that looks into a small business' record to determine if they can play ball and we use the Federal Government, can small businesses have a larger share of the Federal procurement pie, can they play ball, if a contracting officer determines that they don't comply, that they have too many citations, they are not going to let them have a shot under an RFP situation. There is legislation that has been introduced by Members of the House that would require the Federal Government to maintain a data base of all the citations that businesses have and that the contracting officer would rely on. That is the kind of implications that are in play, and I know this is outside the purview of this Subcommittee. But the concept is that the system isn't accurately reflecting who may or may not be the bad players, and second, it is not giving those small players an opportunity to defend themselves.

I want to address specifically the worker safety issue. ABC is critically committed to worker safety, and we would like to see the OSHA's resources focus on—and let's use the construction industry specifically—on fatalities and major industries. And when you look at some of the citations—there are many of them for the small things—but not for worker fatalities and injuries for electrocution, falls, the terrible problem we have with trucks backing up on people. Those are where the problems are, and we would actually support major enforcement efforts for the serious violations.

And what I am trying to say is if you enact this legislation, it does not necessarily kill OSHA, but it should allow them to shift resources to enforcement on the very serious areas of worker safety. And I don't want to discount that, because for construction—which happens to be an inherently dangerous industry in many

ways—we would support efforts that would assure the agency's efforts are being supported.

I know that is a little off of my written testimony, but I thought it was important to address in the context of safety, which is critically important to this Subcommittee.

Thank you and I welcome your questions.

[The prepared statement of Ms. Drummond follows:]

Statement of Anita Drummond, Senior Director, Legislative and Regulatory Affairs, Associated Builders and Contractors, Arlington, Virginia

INTRODUCTION

Good morning, Mr. Chairman and members of the Subcommittee on Workforce Protections. My name is Anita Drummond and I am the Director of Legal and Regulatory Affairs for the Associated Builders and Contractors (ABC). I would like to thank Chairman Norwood and the members of the subcommittee for the opportunity to address this important piece of legislation, The Occupational Safety and Health Small Employer Access to Justice Act of 2003 (H.R. 2731). This issue is of great significance to the members of ABC, that frequently are faced with the tremendous costs associated with regulatory compliance and costs associated with defending unproven citations. I will be summarizing my comments, but I would request that my full statement be submitted for the official record.

ABC is a national trade association representing more than 23,000 merit shop contractors, subcontractors, material suppliers and construction-related firms in 80 chapters across the United States. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors of the industry.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy within the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, and nondiscrimination based on labor affiliation and the awarding of construction contracts to the lowest responsible bidder, through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

According to the U.S. Census Bureau, in 2000, there were 701,947 construction firms in the United States. Of those firms, nearly all employ fewer than 20 employees and would likely benefit to some degree from the types of reform offered in H.R. 2731.

THE EQUAL ACCESS TO JUSTICE ACT (EAJA)

The size of the federal government and the complexity of many of our nation's laws and regulations are intimidating - especially to the small business community. There is a vast disparity in resources and expertise between small business owners and the federal agencies. Because of this inequality, small businesses and individuals often are forced to choose between settling with the federal government to avoid costly litigation, regardless of the merits of the case, or defending themselves and facing the exorbitant legal fees. This situation stands directly contrary to the original intent of the Equal Access to Justice Act (EAJA), which was to level the playing field for small businesses and encourage the federal government to ensure that the claims it pursues were worthy of its efforts.

Under current law, an employer may only recover attorney's fees and costs incurred in defending an OSHA citation under EAJA—which permits small businesses to recover fees in certain circumstances, as employers are at a great disadvantage against agencies with vast resources. However, EAJA only allows recovery by small businesses if OSHA fails to show that it was "substantially justified" for issuing the citation.

Additionally, the OSH Act's many technical and complex requirements have made it fairly simple for OSHA to develop creative arguments to justify their actions. As a result, EAJA has proven to be less effective in cases dealing with OSHA. In order to fulfill the true intent of EAJA, a small entity (business owners and individuals) that prevails in court against OSHA should be able to recoup their costs and attorney fees.

Fortunately, H.R. 2731 allows small employers to recover costs and attorney's fees if the employer successfully defends itself against an OSHA citation—regardless of whether OSHA can show justification for the citation.

LEGISLATIVE RECOMMENDATIONS

ABC and its member companies are dedicated to safety for all workers. Significantly, ABC is a partner for safety with OSHA. This program tracks companies' injury and illness rate and loss workday rates and identifies problems in development before a problem becomes more serious. Serious injuries and fatalities are ABC's primary concern. ABC offers numerous safety and health training programs at its 80 chapters. For instance, we recently launched a crane operator education and certification program because crane accidents have such severe risks. Additionally, the ABC National Safety Committee created the Safety, Training and Evaluation Process, or STEP, in 1990. STEP, an OSHA recognized program, is an objective, self-evaluation tool that is used by construction contractors to assess their safety policies and procedures.

Chairman Norwood's proposed legislation represents a small step towards assisting the good actors - and the very smallest companies - that maintain a safe workplace. ABC strongly supports the intention of this legislation to level the playing field between an agency and the very smallest of companies when a citation is made. The mechanism—a prevailing party awards of costs and fees - proposed in H.R. 2731 is commonly adopted by federal, state, and local governments to address inequities in prosecution of statutes between the parties.

A provision that grants costs and attorney's fees to the prevailing party is not intended to act as a tool to punish or restrict the actions of a plaintiff. Rather, prevailing party provisions allow defendants to more wisely use their resources without assumed losses, regardless of the merits of their case. Under the current EAJA system, winners lose in terms of money and the reputation of their company. Without a prevailing wage provision, small businesses simply cannot afford to fight, regardless of the likelihood of success, unless they have significant resources to match the government's legal resources.

ABC strongly supports H.R. 2731, but recommends it is amended to include a provision that assures awards for costs and attorney's fees are reimbursed directly out of OSHA's budget. Without this link between enforcement and litigation, behavioral change is unlikely. Currently, such awards under EAJA are not paid by the enforcing agency.

CURRENT UTILIZATION OF EAJA

The initial cost estimate of EAJA, issued by the Congressional Budget Office (CBO) prior to the act's original enactment, estimated that the total awards for all judicial proceedings would be "approximately $67.7 million in fiscal year 1982, $77.6 million in fiscal year 1983, and $90 million in fiscal year 1984." For administrative adjudication, the awards were estimated to be "$19.4 million in fiscal year 1982, increasing to $21.3 million and $22.4 million in fiscal years 1983 and 1984, respectively." However, the General Accounting Office (GAO) issued a report in 1998, analyzing EAJA data from fiscal year 1982 to fiscal year 1994. The report found that over the twelve-year span, only 1,593 applications were filed with federal agencies, of which 604 resulted in an award of fees totaling approximately $4.5 million, an average of approximately $7,500 per claim.

According to a document released by the Small Business Administration, "during that same time period, only 6,773 applications were filed in federal court, and 5,642 resulted in awards of fees totaling $29.6 million, an average of approximately $5,200 per claim." GAO also found that "claims against the Department of Health and Human Services accounted for about 85 percent of all applications submitted, about 92 percent of applications granted, and about 56 percent of the amounts paid."

The results of the GAO study suggest that EAJA has failed to achieve its objectives. The combined twelve-year total of $34.1 million in fees awarded barely reached one-third of CBO's estimates for even the first year of EAJA's enactment alone. Furthermore, the study confirms the conclusion reached by researchers (Professors Susan Gluck Mezey and Susan M. Olson, 1990) that EAJA has primarily become a tool for individual social security claimants, while playing a much less significant role amongst its intended beneficiaries. It is clear that EAJA must undergo some substantial revision if it is to achieve its initial objectives.

CONCLUSION

In the federal court system, litigants are guaranteed certain due process rights to ensure that everyone has the opportunity for fair and impartial adjudication of disputes. However, many of these rights are systematically denied to employers facing allegations under the OSH Act because of the prohibitive loss of defense. Often the cards are stacked so high against employers that they are forced to settle even the most frivolous claims.

The current system invites abusive prosecution and unjustly imposes costs on employers that are not violating the law. While damaging to all businesses, the costs of defense are particularly harmful to small businesses, like many ABC member firms, that lack the resources to defend against unreasonable prosecution. ABC strongly supports H.R. 2731 as a first step towards leveling the playing field for small businesses. We look forward to a constructive dialog on how to improve both the OSH Act and EAJA in order to create a level playing field for small businesses. At this time, I am happy to answer any questions the committee may have.

Chairman NORWOOD. Ms. Drummond, if H.R. 2731 were to become law, what do you suppose would happen? You say today 90 percent of the cases were settled, and it is pretty clear—I mean, anybody understands why they are settled. It is the lesser of two evils.

What do you think would happen if this became law? How many would settle then, do you suppose?

Ms. DRUMMOND. Well, I think there are a couple of questions. First, I would hope that OSHA would assess in its enforcement efforts where they enforce and how they enforce, because maybe in an ideal world 100 percent would settle because they would be going after the right cases; but if they went after the exact same profile of cases, then I would say 90 percent would no longer settle, that you would have in fact a lesser percentage, because they felt that they had not violated the law and had some hope of recouping some costs in attorneys' fees would in fact defend the case.

Chairman NORWOOD. Well, the question was intended to assume that it would be the same.

Ms. DRUMMOND. The same profile, right. But I am hoping that in the good policy environment, that OSHA may reassess how it would enforce.

Chairman NORWOOD. Mr. Robson, have you ever considered running for Congress?

Mr. ROBSON. My dad was a supervisor. That is as far as the family trait goes.

Chairman NORWOOD. One of the reasons I ran for Congress was because of an OSHA inspector. It wasn't the only reason, but it was one of them, and everybody on this Subcommittee loves to say that they are for working families. And we are. I mean, I think we are all for working families. Do you consider your business a working family?

Mr. ROBSON. Yes. That is all there is, and there are many of them in our same situation there. And we are such a small community, that when Robson got hit up for OSHA, within 2 days the whole neighborhood knew.

Chairman NORWOOD. Well, of course. Everybody knows.

Mr. ROBSON. And they want to know what I am going to do, are you going to send them 300 bucks, And I say, no, I ain't going to send them 300 bucks. And then the first thing they did was chop it in half. Well, now, door No. 1, door No. 2, door No. 3, what is going on there?

Chairman NORWOOD. I am delighted that you were willing to fight. More of us need to fight, particularly us working families who are out there and face this big giant Federal agency. Tell me exactly what happened. Did you use the bucket on a tractor? What did they cite you for?

Mr. ROBSON. We are a little ahead of that now. We have a set of forks mounted on the front loader on the tractor and had a pallet on it.

Chairman NORWOOD. I have got one of those.

Mr. ROBSON. And we were probably all of 5 foot off the ground.

Chairman NORWOOD. I understand.

Mr. ROBSON. Now, granted we—.

Chairman NORWOOD. And so you were actually level, then, rather than standing in the bucket?

Mr. ROBSON. Until the oil drips, yes. We are very—you know what I am.

Chairman NORWOOD. I do know that.

Mr. ROBSON. That is—

Chairman NORWOOD. So this guy comes tooling out here, and he says, gee, you are an absolute criminal. Go on, tell me.

Mr. ROBSON. Well, they didn't say that that day, because if they would have started that, I would have probably thrown them out on the road, which most farmers do. But I didn't do that. Very nice lady.

Chairman NORWOOD. I threw mine out, but go ahead.

Mr. ROBSON. But, no, a very nice lady. I had no problem with her. And then a month later comes the violation. It had nothing to do with the money. It was the word "serious" on the violation, and once your business has a serious violation, then the next one, there is no qualms asked.

Chairman NORWOOD. And the fine for you to get even with the Federal Government was—you were to pay how much for being 5 feet off the ground?

Mr. ROBSON. Three hundred dollars.

Chairman NORWOOD. Three hundred bucks. But in your mind, this affected you in your community when they say serious violation, for which everybody knows that affects your reputation. That is different, isn't it?

Mr. ROBSON. I would hope that OSHA is there to help me, not hinder me.

Chairman NORWOOD. Well, I wonder what it would have cost you to obtain an attorney and fight them? Or maybe you have.

Mr. ROBSON. It has only been a year. So they haven't done anything yet. I don't know how long it takes to go. It has been over a year.

Chairman NORWOOD. Did you consider hiring an attorney and taking them to court?

Mr. ROBSON. Basically I believe that when I get in front of a judge and a normal panel, I don't think I will have much of a problem. I don't know.

Chairman NORWOOD. But you still have to pay?

Mr. ROBSON. Yes. I will have to pay.

Chairman NORWOOD. So there is no way to win.

Mr. ROBSON. It is a lose-lose situation.

Chairman NORWOOD. Or you pay twice as much and clear your name.

Mr. ROBSON. But hopefully I am going to help out the next person coming down the pike that maybe doesn't have the gumption to maybe go up and change anything.

Chairman NORWOOD. Well, that is what I am trying to do, too, with this legislation. It is not fair to make the taxpayers take on the Federal Government that has an unlimited amount of dollars from you and me, to take you to court.

Mr. Knott, how much have you ended up spending on legal fees?

Mr. KNOTT. Probably up into the hundreds of thousands.

Chairman NORWOOD. My word.

Mr. KNOTT. They had a case recently where we had a tank with hydrogen nitrogen in it. The OSHA inspector came in and said, this is hazardous to human life. It is a covered tank, because people have to go in there. I said, that's right, but we take the cover off and the hydrogen and nitrogen disappear. And he said, Mr. Knott, I have a Bachelor of Science degree in chemistry, and I am telling you, you are wrong. So we went through the proceeding. The fine for that, by the way, for endangering my associates' lives was $11,250.

So we went to the hearing, and the ALJ found in his favor, said he has a Bachelor of Science degree in chemistry, so therefore he knows that hydrogen is really heavier than air, and Mr. Knott is not a credible witness. So guess what? I appealed that.

Chairman NORWOOD. So the fines would have totaled how much?

Mr. KNOTT. $11,250 was what he wanted, and it will be probably, I don't know, 5, 6, 7 times that before I get finished.

Chairman NORWOOD. So you can't win either.

Mr. KNOTT. What is that?

Chairman NORWOOD. You can't win either, at least from an economic point of view.

Mr. KNOTT. If the U.S. Court of Appeals, right here in Washington, D.C., agrees that hydrogen is heavier than air, then yep, I will be in trouble. And I don't know what the next step is, but if there is one, I am going to take it.

Chairman NORWOOD. Well, this bill is about working families who are trying to run small businesses, which are the backbone of this country, and that is the whole purpose of what we are trying to do here.

The other thing is, and I may say this a number of times, besides protecting working families, the objective of the legislation is to just give OSHA a reason to stop and think before they follow forward with some of this questionable litigation that they do and some of these questionable citations that they do. That is all we are trying to do. It is just folks, use some common sense.

Mr. KNOTT. Let them be at risk.

Chairman NORWOOD. Well, it is risk against me and you, but it is a complex. Mr. Owens, you are now recognized for questioning.

Mr. OWENS. What is the net worth of your company, Mr. Knott?

Mr. KNOTT. The net worth of my company? It is somewhere—let's see. It is under $5 million.

Mr. OWENS. Under $5 million?

Mr. KNOTT. Yep.

Mr. OWENS. You have less than 500 employees?

Mr. KNOTT. No. No. No. I have a little over a hundred. And I started it in an abandoned mill with $87,500. That is all the cash I had. And the mill was 20,000 square feet, and by the end of next

month, it will be 391,000 square feet. And there are many OSHA stories that go with that.

Mr. OWENS. Do you have a special mission that you set up for yourself to fight OSHA, because you seem to welcome cases and want to go after the cases and extend them?

Mr. KNOTT. I do have a special mission, yes. And you know, in June 1956 I took an oath, and the oath was that I promised to uphold the Constitution of the United States and to protect—

Mr. OWENS. Do you consider yourself being harassed by OSHA?

Mr. KNOTT. And to protect this country against all enemies, foreign and domestic.

Mr. OWENS. Do you have too many violations that you consider yourself to be a target of harassment?

Mr. KNOTT. Absolutely. No question about it.

Mr. OWENS. How many violations have you gotten?

Mr. KNOTT. I have probably been through, I don't know, 15 to 20 of those things over the years.

Mr. OWENS. Thank you.

Ms. Drummond, what is the pattern? You see, we don't have a record that OSHA issues that many violations. They don't have that many inspectors. When you compare the ratio of inspectors to the number of businesses out there they have to inspect, the likelihood that you are going to get visited by an OSHA inspector in your lifetime is very low. But yet you also give the impression that you are often being harassed by OSHA inspectors looking at small trivial kinds of problems. Do you have any statistics just to back that up?

Ms. DRUMMOND. What I wanted to point out is that when an OSHA inspector goes in—and I would support 100 percent there are not enough resources at OSHA for proper enforcement activities, but the enforcement activities aren't as focused as they should be, and I think there are some attempts to try to focus on the most serious injuries and illnesses.

There is, instead, that once they are in a site, they are looking for a violation, and how much time are they spending on a site that doesn't have—.

Mr. OWENS. You represent an association; that people in the association would contend that they have OSHA inspectors hanging around quite a bit to the point where they are being harassed?

Ms. DRUMMOND. I have never represented that they were being harassed. I represented specifically that when an OSHA inspector goes to a site, it is hard for an inspector to leave without giving a citation. And that would be an interesting statistic for an inquiry, is how many times someone goes on a site and walks away without a citation and how much time they are spending. But I would like to say that I am not talking about the harassment. I am talking about OSHA's focus should be on the most serious fatalities and injuries, and fatalities specifically, because they do have limited resources.

Mr. OWENS. Thank you.

Mr. Nelson, you did have some figures about the number of inspections?

Mr. NELSON. OSHA over the last few years has been doing about 35,000 to 37,000 inspections a year. Contested cases that get filed

with the Occupational Safety and Health Review Commission are somewhere around 2,200 to 2,400 a year. I can't speak to the number of violations in comparison to the number of inspections.

I think it would be interesting in assessing legislation like this to have something more than anecdotal evidence. I am not sure whether OSHA can provide that or not, but the notion that OSHA is over-enforcing or should overlook, when it is at a workplace, a minor violation that it uncovers seems unwarranted to me.

Mr. OWENS. We have figures over the last 4 years, 6.5 percent of the inspections performed by OSHA resulted in contested citations, 6.5 percent. Fiscal year 2002, only 5.7 percent resulted in contested citations.

Mr. NELSON. That I think jibes with the number of about 22,000 as compared to 35,000 inspections.

Mr. OWENS. Now, there is no private right of action for workers. If this bill became law, H.R. 2731 became law, to balance this, might it not be fair to provide workers with a private right to sue their employer for alleged safety and health violations?

Mr. NELSON. I would say absolutely. If OSHA decides not to pursue a violation right now, there is nothing that the workers can do about it.

Mr. OWENS. I think my time is up.

Chairman NORWOOD. Thank you. Mr. Owens, what was your percentage on contested violations?

Mr. OWENS. 6.5 percent of the inspections resulted in contested violations over the last 4 years.

Chairman NORWOOD. Yes. Now, Ms. Drummond, explain why it is that low. You did earlier, and I don't think—.

Ms. DRUMMOND. It is simply that it is a cost analysis for a business, and I think that the other witnesses have kind of attested to that. You have a violation that is going to cost you $8,400 and you know attorney fees are going to upward of $20,000. It is not—.

Mr. OWENS. The easy trial system would cost you $20,000.

Ms. DRUMMOND. The easy trial system is easier than the regular system, but I would not say it is cheap.

Mr. OWENS. You still think it's $20,000?

Ms. DRUMMOND. I would say it would easily cost—let me use this example. It would easily cost as much for the defense, I would say, if you had a reputable attorney, especially in metropolitan areas, than it would cost for the violation. It is an easy mathematical decision, but it does go to the heart of it and I think this gets to the bottom of it, though we are talking about how do you change OSHA's behavior, I would like to focus on how do you bring some equity to the process when you have a very small business—and we are talking very small business. We are not talking about SBA-size standards. I mean, the construction industry, it is 27.5 million in receipts. I mean, that is far different than a million and a half in net worth.

Even though those are a bit apples and oranges, still there is a difference. And when you are a business who knows that you are going to be walking into an environment where you are probably leveraging those assets in order to take a chance that you know in your heart, you believe in your heart that you are right, there was no intent and you would like to clear your name and you don't

want to have long-term consequences, whether it is in terms of reputation or prohibitions for further business reasons, there should be some equity that you are not facing what is perceived to be endless resources. And we all know that maybe there are finite resources with OSHA, but there are not endless resources.

Mr. OWENS. And you believe one of the actions is more and better-trained OSHA enforcement folks, fewer mistakes?

Ms. DRUMMOND. Let me say, Congressman Owens that ABC financed one of its experts in steel erection to help in the training of compliance officers, in specializing in construction and especially the steel erection standard, which was a tremendous rulemaking procedure that was intended to prevent fatalities in construction and serious injuries. And we put our money where our mouth is when it comes to training compliance officers on the construction industry.

Chairman NORWOOD. Thank you. Just as a personal observation of somebody who has been in small business all his life, one of the ways the Federal attorneys win cases is that they have an unlimited amount of money to spend, and they cause these cases to be as expensive as they possibly can by dragging them out and can automatically win that way, because a small business defendant just can't stand that. It ought not to cost a lot of money, but that is one of their ways of winning.

Mrs. Biggert, you are now recognized, ma'am, for questions.

Mrs. BIGGERT. Thank you very much, Mr. Chairman. In 1999 the CBO scored legislation providing for attorney fees for both the NLRB and OSHA at under $5 million per year. It seems like that covered employers with $7 million in net worth. This bill really has a threshold of $1.5 million and less than 100 employees. Does this have significance to the industries like those that you represent?

Either Mr. Knott or Ms. Drummond.

Ms. DRUMMOND. It does have significance, and I think it may be well worth the Subcommittee evaluating and discussing with the SBA how they make their size determinations. Whether you adopted those size determinations or some sort of formula that was similar, you really have to look at the capital intensity of an industry to determine what would be an adequate-size standard depending on the industry type. Construction has a very, very low cash-flow issue. You look at manufacturing, they have intense capital investments. So you may want to determine if the size standard would be more appropriately evaluated according to industry types, and the Small Business Administration has a size standard office that specializes in that.

Mrs. BIGGERT. It seems like from the testimony that we have heard, are there any cases where the business wins?

Ms. DRUMMOND. Few.

Mrs. BIGGERT. A few?

Ms. DRUMMOND. Few. I am trying to think of one good example. There are a few. There are so few of them that they really don't set much of a standard. I mean, even when OSHA was challenging its prior determination interpretation under the, I believe it is the Briggs case, the court held that prevailing, that the small business defendant could not in fact collect, because they thought it was substantially justified for OSHA to pursue the case, even though

they are now taking a different interpretation of its regulation. So that is the type of thing where it is very hard to overcome that substantially justified standard.

Mrs. BIGGERT. And what is the next step, just in procedure, like with the EAJ, and since that probably is the standard for this bill, to pursue an appeal? How does the appeal work in this case?

Ms. DRUMMOND. You may go to the court of appeals, or you may go before the Commission. So going to the court of appeals is the route I believe that Mr. Knott is taking.

Mrs. BIGGERT. Is that correct, Mr. Knott, you go right from OSHA?

Mr. KNOTT. From the ALJ hearings, you go to the court of appeals.

Mrs. BIGGERT. And that is the Federal court?

Mr. KNOTT. Yes.

Mrs. BIGGERT. Let me ask just one more question. Let's say your employer is cited for several different violations and they win on one count and then lose on the others. Under this bill, would they still be able to collect attorney fees for the count that they win on?

Ms. DRUMMOND. The standard for the Federal court system, and generally adopted by the States for the definition of a prevailing party, and that applies to other Federal statutes and State and local statutes that provide prevailing party awards, the standard is the prevailing party is one who succeeds in a significant issue and receives some of the relief sought in bringing the action. So it is really a mixed bag.

So if it is a mixed bag and let's use the scenario you presented where they win on one issue but then lose on three or four, it is unlikely, unless it was a significant issue if it was the primary citation, it was the most serious citations and the others were only paperwork citations. Then you might see an environment where the judge would in fact provide that they would be considered the prevailing party.

Some jurisdictions, such as the 7th Circuit and the 11th Circuit, have a little bit higher standard, where you have to substantially benefit from the outcome, which is a little bit different than some benefit.

Mrs. BIGGERT. Thank you. Thank you, Mr. Chairman. I yield back.

Chairman NORWOOD. Thank you, Mrs. Biggert.

I would now like to recognize my colleague and friend from Georgia, Ms. Majette. Are you ready for questioning?

Ms. MAJETTE. Thank you, Mr. Chairman, and I thank the panelists for being here to offer your testimony today.

And let me preface my remarks by saying that I empathize with the situations that all of you have described, and I do that from the standpoint of having been an attorney and when I worked at Legal Aid, we were subject to the issue of attorneys' fees and how those got paid. I have been a small business owner as a private practitioner, and then I served as an administrative law judge on the Workers Compensation Board in Georgia before serving on the State court. And I resigned that to come here and have a lot of fun serving in Congress.

So I look at this as a situation from those different perspectives and the need for balancing the concerns of employers and small business owners with the need to protect workers and making sure that they are in an environment that allows them to do the work that they need to do, in a safe and secure manner, so that they can be productive employees for their employers.

And Mr. Knott and Mr. Robson, the situations that you described really, frankly, should not have happened. And I have no doubt that those situations were ones that occurred in the manner in which you described them because of the experiences that I have had. But it sounds to me and my experience has been that a lot of times the root of the problem is a lack of training or poor communication on the part of the—in your case I guess, Mr. Knott, on the part of the OSHA employee.

And so my question—and I would—if time permits, I would like each of you to address it from your own perspective. But would you agree with me that rather than putting in place this kind of legislation that I think perhaps wouldn't actually address the root of the problem, that perhaps we should concentrate on making sure that the OSHA staff and employees have sufficient training, that they get the skills development that they need, that they have those communication skills, and that the OSHA inspectors have the resources that they need to be able to do the job properly? Because I think in the situations that you described, something went wrong very early on, and it shouldn't have gotten to the point at which tens of thousands of dollars were being expended on lawyers to resolve the issue.

So if each one of you could address that proposition, I would appreciate it Mr. Robson, or was that all too complicated?

Mr. ROBSON. No. I think we are past that point as far as the lawyer fees and all that. We have created the monster now, and we should try to control it a little bit, that is all. I am not against OSHA. I run a small business. I want my employees to be safe. I am not against OSHA one iota, period; but they have gotten too big and too powerful now, and when they come up against the little man, there is nothing we can do.

Ms. MAJETTE. All right. Thank you. Mr. Knott?

Mr. KNOTT. I had a classic case involving an—

Chairman NORWOOD. Pull your mike over just a little bit, Mr. Knott.

Mr. KNOTT. I had a classic case involving an accident. There was a man who had fractured a couple of fingers, and the OSHA inspector said that his arm had gone between some rolls up to his elbow, and therefore that was, you know, a very serious thing. Had his arm gone between those rolls, which is 15 sixteenths of an inch apart, it would have been 18 inches wide. And when we got that inspector up on the stand we said, how do you know that the arm went in up to the elbow? "well, I saw it" is what that inspector said.

But anyway, the attorney came out, the prosecuting attorney came out and I took him for a walk around the plant. And he took me aside, and he said, "Mr. Knott, you have got a lot going on here. I can't understand how a minuscule thing like this will cause you so much trouble." He said, "Look, give us a little money and we will

go away." I said, "I can't do that. These inspectors just lie, and I want that exposed." He said, "Well, I will tell you right now, it is going to cost you a lot of time and money." and by God, he proved it. He deposed 10 witnesses. We went up to Worcester to the hearing. It took 3 days, and he had 10 people come up to the hearing, including me. So this is where the cost goes up.

Now, if I had given him a little money and he would have gone away, would that be the thing to do? I can't do that. I really can't do that. I don't think it is right.

Ms. MAJETTE. I see my time is up.

Chairman NORWOOD. Thank you, Ms. Majette.

Mr. Kline, you are up. Five minutes for questions.

Mr. KLINE. Thank you, Mr. Chairman, and I will keep it under 5 minutes, noting the lateness of the hour and the ordeal we have already put the witnesses through.

I want to add my thanks to that of my colleagues for your being here today and for your patience. I know it can be enormously upsetting and disruptive when we suddenly get up and walk out and don't reappear for an hour or more and you have great questions in your mind about what we could possibly be doing for the good of the country during that period of time, and we have the same questions.

Having said that, I was just fascinated by the testimony, and I am sure that Mr. Nelson is right; it would be good to have some more empirical data to use. But the anecdotal stories that you have told are very touching. And by coincidence, we seem to all at one time or another have worked in the nursery business, so perhaps there is a special attraction or fascination there.

It is clear that what we are trying to do in this legislation is make sure that OSHA is doing its job correctly, is not abusing power and that businesses have a reasonable recourse. And so, again, in the interest of time and to keep my time short here, I would like to address my question to Ms. Drummond.

You are representing some 23,000 businesses, most of them small businesses in the building and contracting business. We have talked about the number of cases that are settled or contested, and you surely have input from your members. If we pass this legislation, what is your sense of the number of times that your members would take advantage of this and be able to fight the big bureaucracy—let's address that first—and then what the consequences of that might be.

Ms. DRUMMOND. For the smallest companies, and that would be the very smallest companies, I think that they would at least feel that they had a good shot at having their story heard before a party, and that would be an ALJ, that was unbiased and would give them an opportunity to express themselves and to assure their side is heard. I think that there would be more likelihood of challenging it. That doesn't mean that in the end maybe OSHA does prevail and we find out that, you know, OSHA is not being abusive. But I think it is important that we find that out, because in the current system, while not intended to be unfair, it has a consequence of being unfair because the smallest companies don't have that opportunity to have their say. So I think that would be the consequence of it.

Mr. KLINE. So your sense is that there is a fairly large number of your members who would seek to have their day in court if this legislation were to pass?

Ms. DRUMMOND. Those that fall within the standard. And I would say to you—I would caveat that that would probably be a small percentage.

Mr. KLINE. I understand the distinction. The point though I guess what I am trying to get at is if more people were to seek their day in court, I would think the objective here, of course, is to make sure, as the Chairman has pointed out, that the OSHA inspectors are careful to make sure that when they are bringing a citation, it is for a legitimate offense, knowing that if they go to court and lose, that they have to pay for it with appropriated funds, and the inspector, I am sure, would feel some heat from his or her boss if that were to happen. Is that your sense of where we are in this?

Ms. DRUMMOND. Yes, Congressman. And then I will respond to the question regarding whether enforcement education alone works. And I think unfortunately you do need the carrot and the stick. And if you do have to bring in an enforcement official to testify or to be deposed, you may in fact reveal the discrepancies or the inaccuracies that underlie the citation. And I think that is important to flesh that out. And if you have a small business that believes that they have an opportunity to do that, you are going to have a better system, and you are going to have an agency that will invest more of itself in not only educating its enforcement officers on the law but also investing in them the veracity of their enforcement activities.

Mr. KLINE. Thank you. I yield back.

Chairman NORWOOD. Mr. Owens.

Mr. OWENS. Just one clarification. Mr. Robson, do I understand correctly you were inspected by the State of Michigan and not by OSHA?

Mr. ROBSON. My OSHA.

Mr. OWENS. State of Michigan. OK. So you have not dealt with OSHA at all?

Mr. ROBSON. Not in a year.

Mr. OWENS. We are—.

Mr. ROBSON. Not in a year. They cited me the citation. I sent back the paperwork. I am waiting to—.

Mr. OWENS. So State of Michigan, huh?

Mr. ROBSON. Yes.

Mr. OWENS. And you have also not hired an attorney, so you have not paid any legal fees?

Mr. ROBSON. No.

Mr. OWENS. Thank you.

Chairman NORWOOD. You are here representing the Farm Bureau?

Mr. ROBSON. Yep.

Chairman NORWOOD. Not necessarily your case.

Mr. ROBSON. Nope.

Chairman NORWOOD. My observation is in Georgia that they take their marching orders out of Washington, though, and a lot of the way they act—I am talking about the Georgia OSHA. They

take it a lot from observing and talking to OSHA out of Washington.

Let me conclude. I could do this the rest of the day, but that storm is a-coming, and we all have got to scatter. My sense of it is that none of us are very far apart here. Are there enough inspectors? No, and there never will be. Just like there are only 2,000 Federal agents to deal with illegal immigrants in this country, there will never be enough Federal agents to deal with illegal immigrants, and there is never going to be enough OSHA inspectors. But besides that, we need to make sure first that they spend their time wisely and they deal with problems where there is the greatest result for the community, for the country, in safety and health, and that obviously is spending their time in the most dangerous categories out there rather than haphazardly moving around.

And I conclude we need this legislation if you are the only two people on Earth that have been involved in this. I mean, there is nothing that gets me going any more than a Federal agency picking on small working families who are trying to make a living, and if there is only two, so be it. We need to change that. That is not what the Federal Government's job is to do, to find one person or 50, but to mistreat people who are out there trying to make a living, paying their taxes, doing all the things the best they know how to do. And for an inspector of any kind to spend their time—and in some cases it really is they are after somebody. I know you don't want to hear that, but it is true. They really, absolutely, pick on people sometimes, and my observation is that when you get that Federal badge, you grow 4 feet taller. And I don't even know if I am complaining about that, but I know that is a fact. Sometimes they just simply don't know how to deal with people.

So, Mr. Knott and Mr. Robson, if you are the only two Americans that this bill would help, I think we ought to pass it, and we ought to sign it into law and live with the consequences, because the consequence is going to be those inspectors that have grown 4 feet taller are going to be very careful that they don't abuse their rights and their responsibility to help make this country healthier and safer. And I believe this would do it.

Mr. Kline hit it on the head. All you need to do is a few of these, and somebody has got a boss over there somewhere who is going to ask you why you are in court and having to pay the court costs. And maybe that means they need a new inspector if he can't stay out of court because he is filing bad complaints.

So I hope that we will be able to pass this in the House and the Senate. And the next thing immediately to do is pay attention to what is going on out there should this be law. We will find out then how many people actually feel like they are being trounced upon, I guess, by an OSHA inspector, that they cannot in any way afford to defend themselves or their name, it is just too costly. Under this new system, we will find out how many appeals there really would be. And I will tell you what I will bet. I will bet within 5 years you will find a lot less appeals, because there is going to be a lot more forethought given before people start writing tickets.

I thank all of you. I hope all of you are trying to get home tonight, too. It is going to get wet around here tomorrow. We are grateful, really grateful for your time and your willingness to come

and testify before the Subcommittee, and we will keep trucking along and trying to see if we can't do something up here right and get this thing signed into law. Thank you all. The Subcommittee is adjourned.

[Whereupon, at 4:33 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Memorandum from Jon O. Shimabukuro, Legislative Attorney, American Law Division, Congressional Research Service, on "Size Standards and Covered Employers Under Selected Statutes," Submitted for the Record

October 8, 2003

TO: House Committee on Education and the Workforce
Attention: Chris Jacobs

FROM: Jon O. Shimabukuro
Legislative Attorney
American Law Division

SUBJECT: Size Standards and Covered Employers Under Selected Statutes

This memorandum responds to your question concerning size standards and covered employers under selected statutes. The Family and Medical Leave Act ("FMLA"), the Worker Adjustment and Retraining Notification Act ("WARN Act"), Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans With Disabilities Act ("ADA") each define an employer to be either a person or business entity having more than a specified number of employees.[1] Employers retaining fewer employees than the number specified by the statute are not subject to the statute's requirements. You asked for a discussion of Congress's rationale in adopting the various size standards. Although congressional reports and debates related to some of the statutes include brief discussion on the size standards, they still do not provide clear explanations for the adoption of the specific standards. A review of secondary sources, such as legal treatises and law review articles, also failed to uncover Congress's reasons for establishing the various employee thresholds.

With respect to two statutes, the FMLA and Title VII, congressional reports and debates show Congress thinking about the size standards with regard to small employers. During debate on the FMLA, at least two members commented on the measure's fifty employee threshold for covered employers. These comments suggest a general understanding of an intent to exempt small employers from the FMLA's coverage. The comments do not, however, provide insight on why Congress chose fifty employees as the numerical threshold.

In discussing the treatment of temporary staffing organizations that retain few permanent employees, but assign numerous temporary employees to client offices, Rep. Butler Derrick noted that "[s]ince the 50 employee exemption was included in recognition of the problems faced by small employers, it would seem inconsistent to require small temporary help offices to cover their staff employees if they number less than 50.[2] Similarly, Del. Eleanor Holmes Norton commented that "[s]mall businesses will be well shielded from the effects of H.R. 1. It is the family members

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[1] See FMLA, § 101(4)(A), 29 U.S.C. § 2611(4)(A) ("The term "employer —(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year . . ."); WARN Act, § 2(a)(1), 29 U.S.C. § 2101(a)(1) ("As used in this chapter—(1) the term "employer" means any business enterprise that employs—(A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)"); Title VII, § 701(b), 42 U.S.C. § 2000e(b) ("The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ."); ADEA, § 11(b), 29 U.S.C. § 630(b) ("The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."); ADA, § 101(5)(A), 29 U.S.C. § 12111(5)(A) ("The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . .").

[2] 139 Cong. Rec. 1994 (1993).

who work for them who will still have many struggles. [3] The debates on the FMLA do not otherwise appear to offer a more detailed explanation for choosing fifty employees as the numerical threshold.

Although congressional reports that accompanied Title VII do not explain how the employee threshold in that statute was chosen, a House report on the Equal Employment Opportunity Act of 1972 ("EEOA"), a measure that amended Title VII, does discuss the size standard with regard to small employers. [4] Prior to the passage of the EEOA, persons retaining twenty-five or more employees were considered to be "employers" for purposes of coverage under the statute. The EEOA amended Title VII to include within the definition of the term "employer" persons retaining fifteen or more employees.

According to the House report, the change was made in recognition of discrimination being "equally invidious whether practiced by small or large employers." [5] The House Committee on Education and Labor, the committee responsible for the report, observed that

> [b]ecause of the existing limitation . . . proscribing the coverage of Title VII to 25 or more employees or members, a large segment of the Nation's work force is excluded from an effective Federal remedy to redress employment discrimination . . . the Committee feels that the [Equal Employment Opportunity] Commission's remedial power should also be available to all segments of the work force. [6]

The amendment suggests Congress's interest in excluding only the smallest employers from coverage under Title VII.

While it is possible that Congress was similarly concerned about small employers when it established the size standards in the WARN Act, the ADEA, and the ADA, language to support that concern was not found in a review of the congressional reports and debates that accompanied those statutes. In general, any discussion of the size standards in the three statutes appears to have been limited to a reiteration of those standards. For example, the House report on the ADEA states simply: "The term "employer" is so defined as to include only persons having 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. [7] As noted, secondary sources were also unable to explain why Congress chose the specified employee thresholds.

While Congress seems to have been concerned about small employers being burdened by the requirements imposed by the five statutes, it is unclear why the numerical thresholds used in the statutes were chosen.

Memorandum from Jon O. Shimabukuro, Legislative Attorney, American Law Division, Congressional Research Service, on "Covered Parties Under the Equal Access to Justice Act," Submitted for the Record

October 20, 2003

TO: House Committee on Education and the Workforce
Attention: Chris Jacobs

FROM: Jon O. Shimabukuro
Legislative Attorney
American Law Division

SUBJECT: Covered Parties Under the Equal Access to Justice Act

This memorandum responds to your question concerning the size and financial standards that are used in the Equal Access to Justice Act ("EAJA") to determine who is a "party" under that statute. [1] The EAJA seeks to remove economic deterrents to challenging government action by allowing certain individuals and organizations to recover attorney fees, expert witness fees, and other costs when they prevail against the United States. [2] Under the EAJA, a prevailing party may seek costs

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[3] 139 Cong. Rec. 1999 (1993).
[4] See H.R. Rep. No. 92–238, at 20 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2155.
[5] Id.
[6] Id.
[7] H. Rep. No. 805, at 11 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2223.
[1] Equal Access to Justice Act, Pub. L. No. 96–481, tit. II, 94 Stat. 2325 (1980) (amending 5 U.S.C. §504 and 28 U.S.C. §2412). This memorandum supplements an October 8, 2003 memorandum, Size Standards and Covered Employers Under Selected Statutes. A table that compares the size standards discussed in that memorandum with the standards discussed in this memorandum is included.
[2] See S. Rep. No. 96–253 (1979).

and fees related to an adversary adjudication or judicial proceeding. In general, a "party" is defined by the EAJA as either (a) an individual whose net worth did not exceed $2,000,000 at the time the adjudication was initiated or the civil action was filed, or (b) any owner of an unincorporated business or any partnership, corporation, association, unit of local government, or organization with a net worth not exceeding $7,000,000 at the time the adjudication was initiated or the civil action was filed, and with fewer than 500 employees at the time the adjudication was initiated or the civil action was filed.[3] An organization described in section 501(c)(3) of the Internal Revenue Code and a cooperative association defined in section 15(a) of the Agricultural Marketing Act shall also be considered "parties" regardless of the net worth of the organization or cooperative association.[4]

You asked for a discussion of Congress's rationale in adopting the size and financial standards used to determine who is a "party" under the EAJA. Although congressional documents describe a general interest in making it easier for individuals and small businesses to challenge government action, they do not provide clear explanations for why the specific standards were adopted. For example, when the EAJA was introduced, Sen. Pete V. Domenici explained:

> The basic problem this bill seeks to overcome is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. In many cases the Government can proceed in expectation of outlasting its adversary. The purpose of the bill is to redress the balance between the Government acting in its discretionary capacity and the individual.[5]

Similarly, the Senate report that accompanied the EAJA discusses individuals and small businesses with respect to the term "party" without identifying the reasons for choosing the specific standards: "The definition thus establishes financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights."[6]

A review of secondary sources, including law review articles, also failed to uncover Congress's reasons for establishing the size and financial standards used to define a "party" under the EAJA. Although Congress would appear to have been concerned with the economic deterrents that prevent individuals and small employers from pursuing claims against the government, it is not clear why the specific size and financial standards used in the EAJA were chosen.

[An attachment follows:]

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[3] See 5 U.S.C. § 504(b)(1)(B) (" party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 . . . exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act . . . may be a party regardless of the net worth of such organization or cooperative association . . ."); 28 U.S.C. § 2412(d)(2)(B) (" party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 . . . exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act . . . may be a party regardless of the net worth of such organization or cooperative association . . .").

[4] Id.

[5] 125 Cong. Rec. 1437 (1979) (statement of Sen. Pete V. Domenici).

[6] S. Rep. No. 96–253, at 17 (1979).

Size and Financial Standards For Covered Employers or Parties Under Selected Statutes

	FMLA	WARN Act	Title VII
Definition for "Employer" or "Party"	"The term 'employer' – (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year . . ."	"As used in this chapter – (1) the term 'employer' means any business enterprise that employs – (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)"	"The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ."

	ADEA	ADA	EAJA
Definition for "Employer" or "Party"	"The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."	"The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . ."	The term "party" means (a) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated or the civil action was filed, or (b) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated or the civil action was filed, and which had not more than 500 employees at the time the adversary adjudication was initiated or the civil action was filed; except "that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 . . . exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act . . . may be a party regardless of the net worth of such organization or cooperative association . . ."

Letter from R. Bruce Josten, Executive Vice President, Government Affairs, U.S. Chamber of Commerce, Submitted for the Record

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

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202/463-5310

September 17, 2003

The Honorable Charles W. Norwood
Chairman
Subcommittee on Workforce Protections
House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector and region, I would like to express our support for the Occupational Safety and Health Small Employer Access to Justice Act of 2003, H.R. 2731, which is the subject of today's hearing.

The legislation would provide relief to small businesses that are subject to meritless litigation by the Occupational Safety and Health Administration (OSHA). Specifically, H.R. 2731 provides that a small business can recover their attorney fees and costs when prevailing in a case brought against it by OSHA. This will help level the playing field between small employers and this agency. Simply stated, federal agencies have enormous taxpayer funded resources with which to prosecute employers. The practical result is that small entities, far "outgunned" by the agencies, are under unfair and intense pressure to settle cases regardless of their merits simply to end financially crushing litigation. This provision will provide some relief from this situation by telling small entities that, if they do successfully defend themselves, they can at least recoup their expenses. Concurrently, OSHA will undoubtedly more carefully consider the merits of bringing a complaint against small employers in the first place—as they well should.

Small businesses can theoretically recover their costs now under the Equal Access to Justice Act (EAJA) when prevailing against an agency. However, EAJA in fact allows an agency to escape payment when the agency's position, although defeated, is "substantially justified." Thus, an employer must, in effect, re-litigate the case even after prevailing on the underlying action. Not surprisingly, studies done by the Government Accounting Office have found that the rewards under EAJA are relatively rare and the Congressional Budget Office has noted, "In practice, it is very difficult for a prevailing party to prove that the U.S. government did not have substantial justification in bringing a claim forward." H.R. 2731 closes loopholes by creating a simple rule that if a small business prevails it is entitled to reimbursement of attorney fees.

We would ask that the committee reexamine the current threshold for coverage under H.R. 2731—which is 100 employees or less and $1.5 million or less in net worth. This threshold seems unrealistically low and should be raised. The most commonly used definition for "small business" by the Small Business Administration is a business with 500 employees or less and the net worth figure unduly penalizes any small business with machinery and equipment of any appreciable value.

The Occupational Safety and Health Small Employer Access to Justice Act of 2003 is a simple, narrow bill that provides small employers a fighting chance when confronted with charges by well-funded enforcement agencies. The U.S. Chamber has supported similar legislation in the past, and testified in favor of this provision during a hearing held on June 17, 2003. We applaud your efforts on this important issue.

Sincerely,

R. Bruce Josten

Letter from the OSHA Fairness Coalition, Submitted for the Record

October 1, 2003

The Honorable Charles Norwood
Chairman, Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood:

The OSHA Fairness Coalition, being dedicated to bringing greater balance to the Occupational Safety and Health Act (OSH Act), welcomes this opportunity to express our support for H.R. 2731, the Occupational Safety and Health Small Employer Access to Justice Act of 2003. This important bill would allow small businesses to recover attorney fees when prevailing in suits against the Occupational Safety and Health Administration (OSHA). On behalf of the various national trade associations and business organizations that comprise the OSHA Fairness Coalition, thank you for holding a hearing on this important issue.

All too often small businesses pay unwarranted fines or settle meritless suits just to avoid expensive litigation against OSHA, an agency with seemingly endless resources. Indeed, few small businesses can afford to pay hundreds of thousands of dollars in attorney fees to dispute a $500, $1,000, or even $10,000 fine. As a result, meritless OSHA citations have become one more hidden "cost of doing business" that stunts the creation and growth of small businesses—a key source of American jobs and economic prosperity.

In 1980 Congress attempted to protect small businesses from such abusive prosecution by enacting the Equal Access to Justice Act (EAJA). Over the years, however, EAJA has proven ineffective, primarily because agencies may escape paying fees, by demonstrating that they were "substantially justified" in bringing the case or citation, or that "special circumstances" existed to deny an award. Exacerbating this problem are court decisions upholding that an agency need only show that it had a reasonable basis for issuing the citation to be "substantially justified."[1] This is particularly troubling in OSHA cases, where the many technical and complex requirements of the OSH Act have made it fairly easy for OSHA to come up with creative arguments to meet these minimal criteria.

As a result, most small businesses choose to settle even the most meritless cases. Furthermore, employers that are successful against OSHA after deciding to engage in protracted litigation, end up being denied attorney fees—thus paying out more in fees than the original fine. This problem was detailed using both anecdotal stories and statistical evidence provided in testimony during hearings held on September 17, 2003, May 10, 1999, and February 5, 1998.

H.R. 2731 remedies these deficiencies in EAJA by closing the substantial justification and special circumstances loopholes and awarding small businesses their attorney fees anytime they prevail against OSHA.

We thank you for your leadership on this issue and look forward to working with you as H.R. 2731 moves through the legislative process.

Sincerely,

The OSHA Fairness Coalition

Letter from Todd O. McCracken, President, National Small Business Association, Submitted for the Record

October 2, 2003

The Honorable Dr. Charlie Norwood
House Education and Workforce Subcommittee on Workforce Protections
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the National Small Business Association (formerly National Small Business United), I'd like to thank you for your continued leadership in advocating for small businesses across the country. As we hear time and again, small busi-

[1] See e.g., *Pierce v. Underwood,* 487 U.S. 552 (1988).

nesses need and deserve protections against an over-reaching government, and we believe that your bill,, the Occupational Safety and Health Small Employer Access to Justice Act (H.R. 2731), will do just that.

NSBA supports your efforts to ensure that small businesses get a fair shake in litigations with the Occupational Safety and Health Administration. H.R. 2731, if ratified, would allow small business owners to recoup legal fees spent when successfully defending themselves against egregious lawsuits filed by federal agencies. By enabling small businesses to reasonably defend themselves against both judicial review and adversarial adjudications, this legislation would ensure that small businesses are empowered to stand up for themselves rather than settle due to financial constraints.

With the massive bankrolls of taxpayer dollars in the hands of the federal government, small businesses rarely stand a chance in defending themselves, and this legislation would alleviate a large proportion off that problem. Entrepreneurs must be given the same opportunity to defend their business against egregious enforcements as large businesses with large checkbooks have, and we believe that H.R. 2731 is a good start.

H.R. 2731 will level the playing field for small business owners and encourage OSHA to give more thoughtful consideration to assessing enforcements against small businesses. We applaud your dedication to the America's small businesses and look forward to working with you to ensure their fair treatment by the federal government.

Sincerely,

Todd O. McCracken
President
National Small Business Association

Letter from Randel K. Johnson, Vice President, Labor, Immigration & Employee Benefits, U.S. Chamber of Commerce, Submitted for the Record

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

1615 H STREET, N.W.
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October 1, 2003

The Honorable Charles Norwood
Chairman, Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood:

Thank you for holding a hearing on the Occupational Safety and Health Small Employer Access to Justice Act of 2003, H.R. 2731, on September 17, 2003. As we noted in our letter dated September 17 and our testimony during the hearing held on June 17, we are very supportive of this much-needed legislation.

Please find attached a review of cases where small businesses have prevailed on the merits against the Occupational Safety and Health Administration (OSHA) but were still denied recovery under the Equal Access to Justice Act (EAJA). The cases are clear examples of where EAJA has failed small business, and the case summaries on there own provide ample evidence that there is a need for further legislation in this area to protect small businesses from aggressive governmental agencies. Your legislation would address this problem by providing for automatic reimbursement upon proof of innocence.

It is also worth again emphasizing that these are situations where the employer had to expend additional resources to assert its claim under the EAJA that OSHA's actions were not substantially justified. These expenses are beyond those the employer incurred in the underlying case where the employer was found to be innocent. This factor in and of itself is a significant deterrent for businesses pursuing reimbursement of costs.

Also, attached is a table outlining the number of EAJA applications at the Occupational Health and Safety Review Commission (OSHRC) from 1981 to 1999. As the table shows, during those 19 years, OSHRC received only 82 EAJA applications and, out of 75 decisions, there have been only 30 awards for a total of $203,856—less than $7,000 per award. Yet, in 1998 alone, OSHA performed 34,403 inspections and levied $107,978,498 in penalties.

According to these numbers, small businesses have less than a 50% chance of recovering fees even though they successfully defended against OSHA's claims. Given these numbers, it is no surprise that most small businesses will not risk additional expenditures by filing for reimbursement under EAJA. Indeed, as is detailed in the table, the number of small businesses filing EAJA petitions in OSHA cases is astoundingly low, totaling only 4 EAJA applications a year.

Again, we are very supportive of legislation in this area. I would also like to request that this letter and attached materials be included in the record for the September 17, 2003, hearing on the Occupational Safety and Health Small Employer Access to Justice Act of 2003, H.R. 2731.

Sincerely,

Randel K. Johnson

EXAMPLES OF OSHA CASES WHERE EMPLOYERS HAVE PREVAILED ON THE MERITS AGAINST THE GOVERNMENT BUT WERE DENIED RECOVERY UNDER EAJA ON "SUBSTANTIAL JUSTIFICATION" GROUNDS

Contour Erection and Siding Systems, OSHRC Docket No. 96-0063 (1999).

OSHA issued a citation against Contour Erection and Siding Systems (Contour) alleging that the company had overloaded a crane, causing it to tip over during the lifting of a roof truss. Michael Marshall, an OSHA employee with no expertise in crane operation, developed OSHA's theory of the case. Despite his lack of expertise, Marshall dismissed the possibility of mechanical failure as the cause of the accident. The judge in the case observed that in reaching his conclusions, Marshall had disregarded the testimony of nine employees, including both the foreman and the crane operator. Indeed, the judge noted that the Secretary failed to call any "percipient" witness to verify the factual basis for Marshall's conclusions. Marshall claimed he twice consulted with Paul Zorich, a recognized expert in crane operations, and that Zorich agreed with his theory of the case. Yet, during deposition and then again during trial, Zorich testified that, in his expert opinion, the accident was probably caused by mechanical failure, and that he did not understand Marshall's methodology. Zorich also testified that the Secretary's investigative report was incomplete because Marshall had failed to conduct tests on the crane mechanism that would have determined whether electrical malfunction has caused the accident. In the end, Contour prevailed and sued under the EAJA for attorney's fees. The judge found OSHA was substantially justified up until Zorich's deposition, even though Marshall disregarded witness testimony and failed to conduct tests which would have avoided the litigation altogether.

C & D European Stucco and Stone, Inc., OSHRC Docket No. 96-929 (1998).

OSHA issued three citations against brothers Constantin and Daniel Moraru and their small stucco surfacing company. The citations alleged (1) C & D's employees were exposed to a fall hazard while working from an unguarded scaffold; (2) failure to have a competent person make frequent and regular inspections of the job site; and (3) failure to provide training. OSHA withdrew, at the hearing, the citation for failure to provide training. In addition, the Moraru brothers prevailed on the two remaining citations – the ALJ vacated them both at the hearing, on credibility grounds. However, the Moraru's had expended $10,620 in defending themselves against OSHA's meritless claims. They applied for reimbursement of attorney's fees and costs under the EAJA, explaining in their affidavit that the cost of defending the OSHA citations had caused their company's financial ruin. OSHA objected to the fee application, raising the costs to the Moraru's even further. On review, the ALJ (the same ALJ that had decided the merits) found that despite C & D's having prevailed on the merits, they were not entitled to reimbursement of attorney's fees because OSHA had been "substantially justified" in issuing the citations. The ALJ credited the Moraru's testimony that they had inspected the job site, *twice*, on the very day the compliance officer issued the citations, with more weight than that of the compliance officer. The ALJ found similarly with regard to C & D's testimony from their supervisor that in fact no C & D employees were even working on the unguarded side of the scaffolding. In essence, the ALJ held that OSHA was substantially justified in proceeding in pursuing litigation against the Moraru's even though the case was based on the incomplete and incorrect perceptions of the compliance officer who had issued the citations. This case raises the question of whether it would seem reasonable for an agency to first get all the facts before summoning its vast and mighty resources against a small, vulnerable employer.

A.R. Contractors, Inc., OSHRC Docket No. 91-2277 (1994).

OSHA issued a citation against this small contractor for allegedly violating one of its standards requiring that, where such damage is a possibility, precautions must be taken to prevent vehicular traffic damage to LP gas tanks. The standard does not specify the type of precautions necessary to achieve compliance. After having prevailed on the merits, A.R. Contractors filed a petition for reimbursement of attorney's fees and expenses under the EAJA. Although the contractor had strung colored flags around the tanks, placed decals on them, and even provided a full time employee to guard the tanks, the ALJ on review concluded that the OSHA compliance officer was "substantially justified" in issuing the citation. The compliance officer's failure to ascertain the presence of the full time employee was not sufficient to negate the finding of "substantial justification." The contractor's application for reimbursement of the cost of defending against the OSHA citation was denied.

Jaxon Industrial Services, Inc., OSHRC Docket No. 92-884 (1995).

This case arose from an OSHA compliance officer's misinterpretation of an exemption to a standard requiring that an employer have an "emergency response action plan" in cases of hazardous substance spillages. OSHA issued a citation against Jaxon for allegedly failing to have an "emergency response plan." Once it became clear to the Secretary of Labor that Jaxon did in fact have such a plan, the Secretary amended the citation to allege that the plan was not in *writing*. Jaxon argued at trial that they qualified for an exemption from the written plan requirement provided to employers with ten or fewer employees. The judge agreed, finding that the exemption is to be applied on a site-specific basis. Since Jaxon had only five of its twenty employees at the workplace in question, the exemption applied. After prevailing on the merits, Jaxon sought reimbursement of $6,325.14 in attorney's fees and costs in defending against the agency. The judge on review determined that the Secretary's view of the applicability of the exemption was "reasonable," despite the existence of an internal OSHA instruction manual and OSHA case precedent that strongly suggested that the number of employees for a given employer is to be calculated on a workplace-specific basis. In addition, the reviewing judge's decision noted that the spilled substance giving rise to the OSHA inspection was known to be non-hazardous, and that the compliance officer had erroneously believed it to be hazardous. Jaxon's application for reimbursement under the EAJA was denied.

W. Kramer Associates, OSHRC Docket No. 92-1391 EAJ (1994).

OSHA issued a citation to this small employer for failure to have the required notice to employees posted at the worksite. At the hearing, however, it was discovered that two such posters were, in fact, present at the worksite, but the compliance officer had failed to notice them during inspection; hence, the citation was dismissed and the employer prevailed. Even though standard inspection procedure prescribed asking an employer representative about such posters, the ALJ on review held that the agency was "substantially justified" in pursuing its claim against the employer. The compliance officer's failure to notice the posters was not sufficient to render the agency's position not substantially justified. The employer's application for reimbursement under the EAJA was denied.

Secretary of Labor v. Pentecost Contracting Corp., OSHRC Docket No. 92-3789 (1997).

OSHA issued two citations for violations relating to water accumulation and risk of collapse at two separate trenches operated by Pentecost. The citations were identical at each trench, and the penalties proposed by OSHA totaled $105,000. Pentecost admitted the violations, but argued at the hearing that the penalties were duplicative, since each arose from the same set of facts. The judge agreed, finding that a single abatement would have eliminated the violations at both trenches. He grouped each set of violations and assessed a total penalty of $42,000. Pentecost filed an EAJA claim with the OSHA Review Commission, seeking reimbursement for attorney's fees and costs in defending against OSHA's attempted imposition of a double fine. The Commission determined that Pentecost had prevailed against the agency when the judge below grouped the violations, and halved the penalties. The Commission held, however, that although precedent existed for grouping penalties that arose from violations that could be cured by a single act of abatement, the decision to do so was *discretionary* with OSHA. The Secretary was "substantially justified" in seeking separate penalties, said the Commission, because Pentecost had a history of similar trenching violations. Pentecost's application for attorney's fees was denied.

Secretary of Labor v. Mautz & Oren, Inc., OSHRC Docket No. 89-1366 (1993).

Mautz & Oren, a general contractor, was engaged in the restoration and expansion of a sewer treatment plant. An OSHA inspection of the worksite resulted in a citation alleging a failure to have ground fault circuit interrupters (GFCI's) at the site's temporary power outlets. Mautz & Oren contested the citation, arguing that the Secretary failed to prove that the outlets in use were of the same voltage and amperage covered by the regulation allegedly violated. The hearing judge dismissed Mautz's argument, affirmed the citation and assessed the proposed penalty of $980. Mautz & Oren sought review of the decision, filing a brief in support of their position. The Secretary requested two extensions of time, which were granted, and then filed a notice of withdrawal of the citation, citing "prosecutorial discretion." The Commission accepted the withdrawal and vacated the citation. Mautz & Oren, having prevailed over OSHA, sought reimbursement of attorney's fees and expenses under the EAJA. The judge denied the request, finding that the Secretary, despite having later withdrawn the citation, had been "substantially justified" in issuing and in pursuing litigation. Mautz then petitioned for review by the full Commission, seeking reimbursement for attorney's fees and expenses that had now grown to over $14,000. The Commission held that the Secretary's failure to prove the voltage and amperage of Mautz's temporary outlets did not eliminate justification for the citation, since the Secretary could also have based the citation upon violation of another provision of the regulation. The fact that the Secretary later chose to withdraw the citation did not negate the justification for having issued the citation in the first instance. Recovery under the EAJA was denied.

The following are additional cases where claimants were denied recovery of attorney's fees, based on the "substantial justification" standard, after having prevailed on the merits against OSHA:

Globe Contractors, Inc., OSHRC Docket No. 95-0494 (1998).

Megawest Financial, Inc., OSHRC Docket No. 93-2879 (1995).

Ralph Taynton d/b/a/ Service Specialty Co., OSHRC Docket No. 92-498 (1996).

Secretary of Labor v. Consolidated Construction, Inc., OSHRC Docket No. 89-2839 (1993).

K M & M, A Joint Venture, OSHRC Docket No. 89-1618 (1991).

Dennis F. Casey, Inc.; Extec Contracting, Inc., OSHRC Docket No. 88-2039; 88-2040 (1990).

Secretary of Labor v. Boyd Service, Inc., 1987 U.S. Dist. LEXIS 14926 (1987).

Secretary of Labor v. Hocking Valley Steel Erectors, OSHRC Docket No. 80-1463 (1983).

S & H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426 (5th Cir. 1982).

EAJA Applications at OSHRC, Fiscal Years 1981-1999[a]:
[*Source: Office of the General Counsel, Occupational Safety & Health Review Commission.*]

Fiscal Year	Number decided	Number granted	Amount awarded
1981	0	0	0
1982	2	0	0
1983	4	0	0
1984	2	1	$2,969
1985	6	0	0
1986	4	1	$8,392
1987	6	3	$14,535
1988	4	3	$18,831
1989	5	3	$5,461
1990	4	2	$12,423
1991	8	5	$40,678
1992	1	1	$10,281
1993	2	1	$14,158
1994	5	0	0
1995	5	3	$5,583
1996	2	0	0
1997	6	2	$28,876
1998	4	2	$5,000
1999	5[b]	3	$36,671
TOTALS	82	30	$203,856

NOTE: For comparison purposes, it is worth noting that, for FY98, the total number of unfair labor practice (ULP) charges filed with the NLRB against private employers and labor unions was 30,439. From these charges, the NLRB issued 2,775 complaints. The number of OSHA inspections in FY98 was 34,403, which resulted in total violations of 98,256. OSHA levied penalties in the amount of $107,987,498.

[a] Information provided to the House Education & Workforce Committee by the Office of the General Counsel, OSHRC, on June 17, 1999. The Commission indicated that it's computerized case tracking system only goes back two to three years. Lexis searches were used to supplement that information. Furthermore, the General Counsel noted there probably exist EAJA cases that were disposed of by administrative law judges' orders that were never included in the Lexis database, and that, therefore, the numbers were probably low, but there are probably not "many" more.

[b] Seven EAJA applications were pending as of June 17, 1999.

Letter from James "Skipper" Kendrick, CSP, President, American Society of Safety Engineers, Submitted for the Record

September 15, 2003

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515–6100

RE:Comments on HR 2728, HR 2729, HR 2730 and HR 2731

Dear Chairman Norwood:

The American Society of Safety Engineers (ASSE), on behalf of its 30,000 member safety, health and environmental professionals, sincerely commends you for your continued leadership in advancing occupational safety and health issues. ASSE appreciates the opportunity to offer the following comments concerning the series of bills you have introduced aimed at addressing long-standing fairness issues in occupational safety and health regulation. As you know, ASSE is a professional society whose members are dedicated to workplace safety and health and who deal every day with the same concerns your legislations seeks to address.

The Society has reviewed these bills and offers these comments to provide support for your efforts where we can but also to suggest changes that ASSE believes can help the bills achieve their overall purpose of improving the ability of small businesses in good faith to meet federal occupational safety and health requirements without excessive burdens that may take away incentives to make such improvements.

HR 2728 — Occupational Safety and Health Small Business Day in Court Act of 2003

ASSE understands the reasoning underlying HR 2728, which is to codify giving some lee way to employers who, because of unique circumstances or despite their best efforts, miss the 15-day contest deadline to respond to Occupational Safety and Health Administration (OSHA) citations and, for the same reason, to give the Occupational Safety and Health Review Commission (OSHRC), on a case-by-case basis, the ability to reopen a final order for similar failures to respond.

ASSE's members agree that 15 days can, in some unique circumstances, be an unnecessarily difficult deadline to meet.

For a truly small business owner who is a sole manager and may be out of town on vacation, 15 days to contest may not be enough time. For some small businesses in remote areas, finding the appropriate safety, health and environmental resources to give advice or help respond adequately may be difficult in that time frame. For nearly all businesses in nearly all situations, however, 15 days is time enough, and as written, the suggested language— unless such failure results from mistake, inadvertence, surprise, or excusable neglect —is far too broad. The language would give too many businesses too easily achieved excuses for not meeting the deadline and, ultimately, eviscerate the 15-day deadline.

ASSE urges a more practical solution to this problem, which is simply to expand the 15-day contest time period to 18 days. The 3 extra days could give just enough additional time to help small companies in unique situations without unduly compromising the requirement that employers respond quickly.

HR 2729 — "Occupational Safety and Health Review Commission Efficiency Act of 2003"

HR 2729 contains several provisions aimed at changing OSHRC. ASSE can only support one of these proposed changes—expansion of the OSHRC from 3 to 5 members. The work of the OSHRC could be more efficiently accomplished with the addition of two more members.

ASSE cannot support the other provisions of this bill, however. Requiring members to be lawyers goes against the history of some very good, productive OSHRC members who were not lawyers and would mean that most safety, health and environmental professionals, who ASSE represents, could not be members no matter how otherwise well qualified they might be.

Provisions that would give the President dramatically increased control over OSHRC members appointments also cannot be supported by ASSE. Giving the President at-will power to extend a member's term without limit as well as the power to remove a member "for inefficiency, neglect of duty, or malfeasance in of-

fice" effectively takes away any independence of the OSHRC. The power the Presidency has in making appointments should be power enough. Federal law already adequately protects the public from members who might abuse or neglect their responsibilities during their terms of office.

Finally, if it is advisable to expand the OSHRC from three to five members, as HR 2729 proposes, ASSE does not understand why it would be advisable to allow OSHRC's powers to be delegated to groups of three members, where a quorum of two members would be allowed, as HR 2729 also provides. For the same reasons we support an expansion of OSHRC, we cannot support a provision that would allow as few as two members to decide issues that can impact worker health and safety.

HR 2730 — "Occupational Safety and Health Independent Review of OSHA Citations Act of 2003"

ASSE agrees that fundamental fairness demands that employers should have the opportunity for a fair and independent review of any charge against them as envisioned in the legislative history of the Occupational Safety and Health Act. Recent case law decisions have required OSHRC to defer extensively to the Secretary of Labor's interpretation of standards or enforcement actions, which essentially alters the burden of proof placed upon employers. This approach is corrected by HR 2730, which clarifies that, on appeal, OSHRC's decisions "with respect to all questions of law" are to be given "deference if reasonable." OSHRC would then be free to review the facts and applicable law *de novo.*

ASSE is sympathetic with the intent of HR 2730, but we cannot support the bill. Attempting to address the limits on OSHRC's ability to review cases is a laudable effort. Yet, the phrase "if reasonable" only serves to change where the difficult question of appropriate review is conducted, not solve it. Frankly, we do not see how these provisions can be rewritten to provide the best, appropriate balance. If that is the case, ASSE must rely on the judicial decisions have seen fit to defer to the Secretary of Labor. While not a perfect solution, at least the Secretary of Labor's decisions are more visible to Congress and the American people, providing another kind of check and balance to inappropriate actions.

HR 2731 — "Occupational Safety and Health Small Employer Access to Justice Act of 2003"

Finally, ASSE has evaluated the expansion of relief under HR 2731, which would entitle employers with fewer than 100 employees and $1.5 million in revenues to attorney fees if they prevail in OSHA litigation. ASSE understands that it can be extremely difficult, under current law, for small companies to gain relief by establishing that OSHA's position was not "substantially justified" when going against the Office of the Solicitor with a great deal of experience in carrying this minimal burden. As a result, small companies may both "win" a case but "lose" because attorney fees could exceed the amount of proposed civil penalties. Some added protections for truly small employers are needed.

ASSE supports providing small employers the ability to recover attorney fees that HR 2731 proposes. However, ASSE can only support its application to truly small employers. The definition of small employer in the bill must be lowered to 25 and $1 million in assets. If the concern is to address a disproportionate burden placed on small employers in challenging OSHA actions, a 100-employee company with $1.5 million in assets, which the bill defines as a small employer, would appear to be able to assume the risk of litigation. Awarding attorneys fees is a dramatic step in limiting the power of the government to fulfill its enforcement powers and only where experience shows that individuals or companies may be powerless. That case can be made for truly small employers.

Conclusion

ASSE appreciates your continued commitment to workplace safety and health through your thoughtful consideration of practical, workable means that encourage employers to be invested the welfare of their employees. ASSE hopes that our comments help you and the Subcommittee to determine the best way to meet the goal of these bills. Giving small employers new tools to help them work with OSHA in addressing workplace safety and health risks is a goal we share with you. As always, ASSE appreciates your consideration of these comments and looks forward to continued cooperation with you in enhancing workplace safety and health.

Sincerely,

James "Skipper" Kendrick, CSP
President
American Society of Safety Engineers

Statement of William Samuel, Legislative Director, American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Submitted for the Record

The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), a federation of 64 affiliated unions representing 13 million working men and women and their families, appreciates the opportunity to submit this testimony in opposition to H.R. 2731, the "Occupational Safety and Health Small Employer Access to Justice Act of 2003."

H.R. 2731 would amend the Occupational Safety and Health Act (OSH Act) to require the Secretary of Labor to pay attorneys' fees and expenses to prevailing employers, as defined in the bill, in any administrative or judicial proceeding concerning an enforcement action initiated by the Occupational Safety and Health Administration (OSHA) or a successful legal challenge by the employer to any OSHA rule or regulation.

The AFL–CIO strongly opposes this bill. In our view, the bill is misguided and would seriously weaken enforcement of the OSH Act at a time when greater, not less, enforcement of the law is sorely needed.

Each year, millions of workers are injured or made ill from job hazards. Sixteen workers die on the job each day, and the number would be far higher if deaths from occupational diseases such as cancer and black lung disease were included. At its current budget levels, OSHA's enforcement reach is severely limited. In fiscal year 2002, 887 federal OSHA inspectors conducted 37,565 inspections in workplaces falling under federal OSHA's jurisdiction. (State OSHA plans conducted 59,872 inspections in the workplaces falling within their jurisdiction). At its current staffing and inspection levels, it would take federal OSHA 115 years to inspect each workplace under its jurisdiction just once.[1]

The penalties assessed by OSHA for violations of the law are exceedingly modest. In fiscal year 2002, OSHA assessed a total of $73 million in penalties against employers for 78,433 violations of the law - an average penalty of only $928. The average penalty for a serious violation of the OSH Act, defined as a hazard posing a "substantial probability that death or serious physical harm could result," 29 U.S.C. § 666(k), is only $867 out of a possible $7000.[2]

These statistics show that more, not less, enforcement of the OSHA law is needed to protect American workers from job hazards. But H.R. 2731 would chill enforcement of the law and would divert much-needed resources from enforcement and standard-setting to paying the attorneys fees and costs of employers that successfully fight an OSHA citation or an OSHA rule.

Under the age-old American Rule, each party to litigation pays its own expenses. This is true not only in private litigation but also in cases in which the government acts as public prosecutor to enforce consumer protection laws, environmental laws, safety and health laws, and labor laws. The Equal Access to Justice Act (EAJA) provides a limited exception to the American Rule. Under EAJA, organizations with no more than 500 employees and a net worth of no more than $7 million, can recover their fees and costs if they prevail in administrative or judicial proceedings against any United States government agency, but only if they meet two conditions. First, an award is proper under EAJA only if the agency's position was not substantially justified. Second, an award can only be made if there are no special circumstances that would make the award unjust. 5 U.S.C. § 504.

H.R. 2731 would create a special exception from the American Rule, and from EAJA, for legal proceedings under the OSH Act. Employers that prevailed in administrative or judicial proceedings under the OSH Act would be entitled to fees and costs from OSHA without having to show that the government's position lacked substantial justification and that there are no special circumstances that would make an award unjust.

There is no credible reason for carving out this exception either to the American Rule or to EAJA. By subjecting OSHA to the payment of attorney's fees and costs every time the agency loses a case to an employer falling within the bill's definition, the bill would seriously weaken OSHA's effectiveness.

Notwithstanding the bill's title as being directed to "small" employers, the bill's reach is broad. It applies to all employers with not more than 100 employees and a net worth of not more than $1.5 million. Bureau of Labor Statistics data for the first quarter of 2000 show that there were nearly 7.4 million private sector establishments with 99 or fewer employees—or 97.7 percent of all private sector establishments. In contrast, Congress traditionally defines "small business" for the pur-

[1] AFL–CIO, Death on the Job: The Toll of Neglect (April 2003), at 5.
[2] AFL–CIO, Death on the Job: The Toll of Neglect (April 2003), at 4.

pose of establishing coverage under a range of other employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), covers employers with fifteen or more employees. But almost all private sector establishments would fall within the employee threshold for coverage established by H.R. 2731.

Nor would the bill's limitation in coverage to employers with less than $1.5 million in net worth necessarily limit its broad reach. In particular, many businesses in the service sector have limited capital assets and would fall within the $1.5 million net worth limit. Telemarketing companies, building services providers, and personnel agencies are but a few examples of lowcapital industries whose employers could fall within the $1.5 million definition (and who would similarly fall within the 100-employee threshold). If the definition were based on $1.5 million in annual sales as opposed to net worth, fully 41 percent of companies would fall within the definition, according to Dun & Bradstreet data.

Statistics under the OSH Act belie any claim that small employers are under tremendous pressure to settle OSHA citations in order to avoid the high cost of litigating them. First, as already discussed, monetary penalties under the OSH Act are exceedingly modest—an average of only $928 per violation of the law. Moreover, under the OH Act, the penalty may be reduced according to the size of the business. Employers with between 1 and 25 employees may receive a penalty reduction of up to 60%, while those with between 26 and 100 employees may receive a reduction of up to 40%.[3]

According to OSHA, the agency awarded $192,494 in EAJA fees during Fiscal Years 1987 - 1997, in 28 cases. This amounts to an average EAJA award of $6,874, a statistic which hardly shows that employers—small or large—have expended huge sums of money in defense of merit's suits under the OH Act.

In fiscal year 2002, employers contested only 8.1 % of all OH Act citations issued against them.[4] Clearly, this is not because they face prohibitively high penalties if they choose to forego settlement and pursue their administrative and judicial remedies. But H.R. 2731 would provide a monetary incentive for more employers to challenge OSHA citations, to spare no expense, and to drag out litigation of the case, because at the end of the day they could recover their attorneys fees and costs if they prevailed.

As previously, indicated, EAJA currently provides for fee awards if the government's position is not "substantially justified." EAJA thus penalizes—and deters—the filing of insubstantial complaints. No rational public policy would be furthered by discouraging OSHA from issuing citations that are substantially justified, but as to which the government ultimately is unable to carry its burden of proof. Rather, the inevitable result of such a rule, which would penalize the government every time it loses, would be to chill the issuance of meritorious citations in close cases on behalf of employees exposed to unsafe working conditions.

It is important to point out that H.R. 2731 is not limited to enforcement proceedings initiated by OSHA. By its terms, H.R. 2731 applies to any administrative or judicial proceeding, meaning that qualifying employers could recover their attorneys fees and costs for successfully challenging an OSHA standard or regulation in court. While OSHA has been quite successful in defending its rules and standards, this provision will create a huge financial incentive for businesses to fight OSHA's rules even more routinely and aggressively, given the possibility of recovering their attorneys fees and costs at the end. As a result, OSHA will be even more reluctant to issue much-needed workplace safety rules to protect workers.

Unless H.R. 2731 were accompanied by increased appropriations to pay the awards the bill requires, the net effect of enacting this legislation would be to diminish the resources available for the enforcement of the OSH Act. As previously indicated, OSHA already operates under a very tight budget—a budget that this Administration repeatedly has sought to cut. Passage of this bill would further reduce the resources available for implementing and enforcing the OSH Act, to the detriment of working men and women who depend on OSHA to protect their safety and health on the job.

For all these reasons, the AFL–CIO believes that H.R. 2731 is misguided and one-sided and should be rejected.

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[3] OSHA Instruction CPL 2.103.

[4] BNA Occupational Safety & Health Reporter (Jan. 9, 2003), at S–9

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